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## Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States

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## MANY ARE CHILLED, BUT FEW ARE FROZEN:

# HOW TRANSFORMATIVE LEARNING IN POPULAR CULTURE, CHRISTIANITY, AND SCIENCE WILL LEAD TO THE EVENTUAL DEMISE OF LEGALLY SANCTIONED DISCRIMINATION AGAINST SEXUAL MINORITIES IN THE UNITED STATES

SUSAN J. BECKER \*

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## INTRODUCTION

The title of this article, "Many are chilled, but few are frozen," is derived from the Christian Biblical verse, "many are called, but few are chosen."<sup>1</sup> This line concludes a parable about a king enraged by a guest's failure to wear appropriate attire to a wedding. The king ordered the man bound hand and foot and carried off to an uncertain, but undoubtedly unpleasant, fate in the wilderness.<sup>2</sup>

The crusade against sexual minorities<sup>3</sup> currently being executed by militant conservatives in the United States<sup>4</sup> provides renewed

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1. *Matthew* 22:14.

2. *See Matthew* 22:1-14.

3. For purposes of this article, "sexual minorities" means gay, lesbian and bisexual people who have a preference for partnering with a person of the same biologic sex due to the mental, emotional and physical satisfaction derived from such a relationship; intersexed individuals whose genitalia, gonads, chromosomes and other indicia of sex are not one-hundred percent congruent with the binary definition of male or female; transgender people whose biologic sex, outward gender appearance or presentation is incongruent with their internal gender identities; and transsexual individuals undergoing medically supervised gender transition.

4. *See* Bob Moser, *Holy War: The Religious Crusade Against Gays Has Been Building for 30 Years*, INTELLIGENCE REP., Spring 2005, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=522> (providing accounts of the historical and contemporary anti-gay movement). Many people attribute current crusaders' zealotry to the decision in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 968-70 (Mass. 2003), which made Massachusetts the first state to recognize same-sex marriage. *See generally* Symposium, *The Legislative Backlash to Advances in Rights for Same-Sex Couples*, 40 TULSA L. REV. 371 (2005). The crusade is not, however, a recent phenomenon. *See* CHRIS BULL & JOHN GALLAGHER, *PERFECT ENEMIES: THE BATTLE BETWEEN THE RELIGIOUS RIGHT AND THE GAY MOVEMENT* 1-38 (updated ed., Madison Books 2001) (1996) (tracing the origins of both the gay rights

meaning for this scripture. Like the king in the parable, some conservatives<sup>5</sup> advocate that any person not properly attired in the robe of heteronormativity<sup>6</sup> should be banished not only from wedding celebrations (especially their own), but from any meaningful participation in U.S. society.<sup>7</sup> According to some media reports, conservatives are winning this cultural battle.<sup>8</sup> As demonstrated in this article, however, reports of the demise of the sexual minority civil rights movement are premature. Rather, it is legally sanctioned discrimination<sup>9</sup> against sexual minorities that is on its deathbed.

While this country's historically chilly reception to lesbian, gay and bisexual persons cannot be denied, contemporary evidence of warming trends abound. The six developments summarized immediately below and more fully articulated throughout this article represent some of those trends.

First, decades of momentum garnered by the civil rights movements for sexual minorities, paired with the movement's proven ability to weather setbacks and adversity, suggest that contemporary challenges

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and evangelical movements); CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES, 121-54 (2002) (describing the Christian Right's organized opposition to gay rights since the early 1970s).

5. While this article critiques conservative politicians, religious leaders and others who refuse to engage in honest discourse about the lives of sexual minorities, the author readily acknowledges that some persons who identify as conservative endorse fair treatment of sexual minorities.

6. See MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 41-88 (1999) (defining heteronormativity as society's acceptance of heterosexual relationships as the elemental basis for all human relationships and the continued existence of society); Joan W. Howarth, *Adventures in Heteronormativity: The Straight Line from Liberace to Lawrence*, 5 NEV. L.J. 260, 260 (2004) (describing heteronormativity as "the complex social, political, legal, economic and cultural systems that together construct the primacy, normalcy, and dominance of heterosexuality").

7. See Moser, *supra* note 4.

8. Events such as the passage of anti-gay marriage initiatives in thirteen states in 2004 and the re-election of a president who endorses a U.S. Constitutional amendment outlawing same-sex marriage support the media's analyses. See Jim VandeHei, *Freedom, Culture of Life United Bush and Pope: Disputes Focused on Methods*, WASH. POST, Apr. 7, 2005, at A19 (reporting on the views President Bush shared with the late Roman Catholic pontiff, John Paul II, including opposition to same-sex marriage); see also Lornet Turnbull, *Gay Couples Pinning Hopes for Marriage on High Court*, SEATTLE TIMES, Mar. 6, 2005, at B1 (reporting on state constitutional amendments in 2004 that banned same-sex marriages in Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah). Alaska, Hawaii, Nebraska and Nevada had already banned same-sex marriage. *Id.*

9. For purposes of this article, "legally sanctioned discrimination" encompasses but is not limited to the law's failure to protect sexual minorities from discrimination in employment, housing, public accommodation and other areas; the law's disadvantageous treatment of sexual minorities in family law and probate matters; and the law's denial of standing to sexual minorities to pursue wrongful death, loss of consortium and other remedial causes of action.

will not deter the movement.<sup>10</sup>

Second, while the political clout of Christian and secular conservatives should not be underestimated, it is nothing new. More importantly, emerging Christian voices now advocate greater acceptance of sexual minorities within denominations and throughout society.<sup>11</sup>

Third, medical researchers and social scientists continue to build an impressive body of empirical data that confronts the tradition of reserving “normalcy” solely for heterosexuals who fit the classic male-female dichotomy. These scientific discoveries directly influence courts and legislatures faced with issues related to biological sex, gender roles and sexual identity, and affect the public’s perception of sexual minorities.<sup>12</sup>

Fourth, gay, lesbian, bisexual and transgender people have become highly visible within their own families and in political, academic, workplace, community and multi-media venues. This openness and exposure, in turn, destroys stereotypes and facilitates positive perceptions of sexual minorities as ordinary and generative members of society.<sup>13</sup>

Fifth, globalization has moved from the realm of political theory to fact. The extension of rights to sexual minorities in other countries<sup>14</sup> will continue to influence social and legal trends in this country.<sup>15</sup>

Finally, all of these factors are coalescing to create a climate that encourages transformative learning, a cognitive process that inspires adults to reassess individual beliefs in a manner that ultimately effectuates social change.<sup>16</sup> Medical and social scientists have experienced significant transformation of thought about sexual minorities<sup>17</sup> while Christianity is just starting this process.<sup>18</sup> The

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10. See *infra* Part I.

11. See *infra* Part III.B.3.

12. See *infra* Part III.C.

13. See *infra* Part III.A.

14. See Mike Hudson, *You and Me against the World*, ADVOCATE, June 21, 2005, at 89, 92 (listing twenty-two countries that do or will soon recognize same-sex unions).

15. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (citing foreign developments in the Court’s decision to strike down a Texas sodomy law as unconstitutional). See generally Betty C. Burke, Note, *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future United States Reform*, 64 LA. L. REV. 643 (2004); Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41 (2004) (discussing the potential impact of Colombian law on the United States regarding premature or inappropriate genital surgery for intersexed persons); Arthur S. Leonard, *The Impact of International Human Rights Developments on Sexual Minority Rights*, 49 N.Y.L. SCH. L. REV. 525 (2004).

16. See *infra* Part II.B.

17. See *infra* Part III.C.2; *infra* Part III.C.3.

transformative growth originating in these areas is percolating into the general populace in a way that will eventually instigate changes to laws, regulations and policies that treat sexual minorities inequitably.

I more fully support my assertions that legally sanctioned discrimination against sexual minorities is on its deathbed, and that transformative learning is hastening its demise, as follows. Following this introduction, I compare in Part I the current status of sexual minorities in the United States to their standing in the late 1970s. I then juxtapose these advancements with the many challenges the movement has encountered. In Part II, I explain the mechanics conservatives employ to fictionalize the lives of sexual minorities, a process I name “behavior-identity compression,” and I also expose its many flaws. I then enlist transformative learning theory to explain how and why adults are willing to revise and sometimes reverse long-held, negative views about sexual minorities. In Part III, I more closely examine three societal instruments that are both experiencing and facilitating this transformative learning process: (a) increased visibility of sexual minorities; (b) an emerging tradition in Christianity that embraces sexual minorities; and (c) scientific developments that reject the traditional heterosexual, binary norm in favor of much broader definitions of normalcy related to sex, sexuality and sexual identity.

#### I. MILESTONES AND MOMENTUM FOR SEXUAL MINORITIES

The civil rights movements of the twentieth century resulted in laws prohibiting discrimination due to race, gender and disability.<sup>19</sup> In contrast, legal assurances of equal treatment for sexual minorities lag considerably behind.<sup>20</sup> As one family law expert opined, “[t]he story of the last thirty years is the story of advances followed by repercussions.”<sup>21</sup> While this assessment is accurate, comprehensive

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18. See *infra* Part III.B.3.

19. See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination against disabled people); see Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (2000) (prohibiting discrimination “because of an individual’s race, color, religion, sex, or national origin”).

20. See generally WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (2d ed. 2004) (explaining the differential and usually disadvantageous treatment of sexual minorities in contract, criminal, education, entitlement, estates and trusts, family, federal constitutional, health care, immigration, labor, military, private employment, property (real and personal), public employment, state constitutional, tax and tort law).

21. Nancy D. Polikoff, *Raising Children: Lesbian and Gay Parents Face the Public and the Courts* [hereinafter Polikoff, *Raising Children*], in *CREATING CHANGE, SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 305, 334 (John D’Emilio et al. eds., 2000) [hereinafter *CREATING CHANGE*] (discussing the obstacles lesbian and gay parents face in attempting to adopt or gain custody of children).

consideration of the civil rights successes achieved by sexual minorities over the past several decades supports the argument that the proverbial glass is at least half full and that the water continues to rise.

### A. Three Decades of Advancements

#### 1. Legal Status in the Late 1970s

As of the late 1970s, the legal status of sexual minorities in the United States remained grim. In her exhaustive review of law as applied to homosexual and bisexual people, Professor Rhonda R. Rivera documented the rampant employment discrimination<sup>22</sup> then pervading the military,<sup>23</sup> law, medicine, other professions requiring licensure<sup>24</sup> and public school teaching.<sup>25</sup> In rejecting sexual minorities' employment discrimination claims,<sup>26</sup> courts relied on—and perpetuated stereotypes of—homosexuals as choosing and pursuing lives of sexual perversion, criminal behavior, innate immorality and promiscuity.<sup>27</sup>

Family law followed a similar pattern.<sup>28</sup> Courts refused to extend marriage rights to same-sex couples, morally condemned people whose sexual minority status was revealed during (heterosexual) divorce proceedings, routinely denied child custody and frequently imposed severe restrictions on gay and lesbian parents' visitation

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22. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 805-74 (1978-1979) [hereinafter Rivera, *Legal Position*]; see PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 103-28 (2000).

23. See Rivera, *Legal Position*, *supra* note 22, at 837-55.

24. See *id.* at 855-60. A businessperson's ability to obtain a liquor license was also jeopardized by employing or serving homosexuals. See *id.* at 913-24; see also Ira Henry Freeman, *Cafe Drive Turns to Homosexuals*, N.Y. TIMES, Dec. 1, 1960, at 30 (reporting on increased levels of police investigation into liquor establishments).

25. See Rivera, *Legal Position*, *supra* note 22, at 860-74.

26. See *id.* at 805-74.

27. See, e.g., *Schlegel v. United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969) (upholding plaintiff's dismissal from employment on the grounds that a homosexual's presence would undermine the efficiency of the workplace and stating "that a homosexual act is immoral, indecent, lewd, and obscene"); *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340, 1345-46 (Wash. 1977) (affirming a school board's termination of a teacher with years of positive evaluations because "[h]omosexuality is widely condemned as immoral and was so condemned during biblical times;" the teacher had indicated no intent to change; and because he had "made a voluntary choice for which he must be held morally responsible"). These conclusions reflect this society's readiness to conflate homosexual conduct and homosexual identity. See *infra* Part II.A.

28. See Rivera, *Legal Position*, *supra* note 22, at 874-908.

rights.<sup>29</sup> As in the employment cases, the family law courts asserted blanket immorality against homosexual spouses and parents. Even parents imprisoned for committing serious crimes were “treated to less spurious moralizing and discrimination” than were homosexual parents.<sup>30</sup> As Rivera concluded, “[j]ustice for the homosexual parent [did] not come cheaply or often”<sup>31</sup> through the late 1970s.

Transgender and intersexed individuals faced similar obstacles. Attorney Mary Dunlap<sup>32</sup> observed in the late 1970s that while both empirical data and scientific theories “counsel against an absolute two-sex presumption, the United States legal system appears to be fastened firmly” to the view that “two, and only two, distinct and immutable sexes exist.”<sup>33</sup> Dunlap provided numerous examples of “explicit and implicit legal consequences”<sup>34</sup> in education, family law and employment that attach to the state’s determination of a person’s sex. Dunlap also explained that anyone refusing to conform to his or her assigned sex “almost certainly will experience an array of legal coercions toward conformity with the norms of the majoritarian, dominant culture as to female/male indicia of identity.”<sup>35</sup> Penalties for nonconformity ranged from being barred from marrying to being involuntarily committed to a mental institution.<sup>36</sup>

## 2. Current Legal Status

Contemporary legal standards governing the lives of sexual minorities contrast sharply with the descriptions provided by Rivera and Dunlap a quarter-century ago. The U.S. Supreme Court has

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29. *See id.* at 874-904.

30. Anne T. Payne, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAM. L. 797, 818 (1977-1978).

31. Rivera, *Legal Position*, *supra* note 22, at 904; *see* Payne, *supra* note 30, at 799 (concluding that courts often deemed homosexuals *per se* unfit parents).

32. Dunlap made many contributions to the equality movement for sexual minorities including the co-founding of the Equal Rights Advocates law firm. *See* CAIN, *supra* note 22, at 65-67.

33. Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1131 (1978-1979).

34. *Id.* at 1133.

35. *Id.* at 1135.

36. *See id.* This binary view of sex informed the common practice of subjecting intersexed people to surgery shortly after birth to conform ambiguous genitalia to set male or female biological standards. Such premature gender assignment may have disastrous consequences later in life when the surgically constructed gender conflicts with the person’s internal anatomy and gender identity. *See* DEBORAH RUDACILLE, *THE RIDDLE OF GENDER: SCIENCE, ACTIVISM AND TRANSGENDER RIGHTS* 102-40 (2005) (chronicling transgender individuals’ struggle for equality). Among other things, this dissonance may result in an intersexed person being labeled transgender and/or gay, lesbian or bisexual in adulthood.



declared that certain discriminatory laws “born of animosity” toward gay men, lesbians and bisexuals cannot withstand Equal Protection Clause scrutiny<sup>37</sup> and that sexual minorities are entitled to constitutionally assured privacy in their intimate relationships.<sup>38</sup> Same-sex marriage is legal in Massachusetts, civil unions are available in Vermont and Connecticut, and various domestic partner rights exist in California, Hawaii, Maine, New Jersey, New Mexico and the District of Columbia.<sup>39</sup>

In general, sexual minorities are no longer labeled as *per se* unfit for child custody or visitation. Instead, they are being evaluated under the “best interest of the child” standard used for their heterosexual counterparts.<sup>40</sup> Only a few states, including Florida and Utah, have laws or policies that ban gay, lesbian and bisexual individuals from adopting or fostering children, and about half the states have permitted a same-sex partner to adopt a partner’s child, a process known as “second parent adoptions.”<sup>41</sup> No laws expressly prohibit transsexuals or intersexed persons from adopting children.<sup>42</sup>

The federal government, the District of Columbia (D.C.) and twenty-six states prohibit sexual orientation discrimination in public

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37. See *Romer v. Evans*, 517 U.S. 620, 634-35 (1996).

38. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

39. See HUMAN RIGHTS CAMPAIGN (“HRC”), MARRIAGE/RELATIONSHIP LAWS: STATE BY STATE, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=25831&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66> (last visited Jan. 2, 2006) (providing the status of civil unions, domestic partnership laws and same-sex unions in the United States); see also HRC, OREGON MARRIAGE/RELATIONSHIP RECOGNITION LAW, <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=27835&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Jan. 2, 2006) (explaining that marriage licenses were briefly permitted and have since been registered in Oregon for a limited period in 2004 prior to the passage of a state constitutional amendment banning same-sex marriage).

40. See Mark Strasser, *Rebellion in the Eleventh Circuit: On Lawrence, Lofton, and the Best Interests of Children*, 40 TULSA L. REV. 421, 421-22 (2005); see also Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with Best Interests of Children*, 11 CARDOZO WOMEN’S L.J. 1 (2004); Polikoff, *Raising Children*, *supra* note 21, at 305. See generally Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51 (2005) [hereinafter Polikoff, *Lesbian and Gay Parenting*].

41. See HRC, Family, ADOPTION LAWS: STATE BY STATE, <http://www.hrc.org/Template.cfm?Section=Adoption&CONTENTID=19984&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66> (last visited Jan. 4, 2006) (providing the status of adoption laws related to homosexuals for every state).

42. Transgender and intersexed persons may be discriminated against, of course, during the courts’ application of the extremely elastic “best interest of the child” standard. See Polikoff, *Raising Children*, *supra* note 21; Polikoff, *Lesbian and Gay Parenting*, *supra* note 40; see also Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, in REGULATING SEX, THE POLITICS OF INTIMACY AND IDENTITY 35-48 (Elizabeth Bernstein & Laurie Schaffner eds. 2005) (discussing limited advancements in the United State’s legal treatment of its transgender citizens).

employment; D.C. and seventeen of these states prohibit discrimination in private employment as well; D.C. and thirteen of these states also prohibit gender identity discrimination in the workplace.<sup>43</sup> Well over eight thousand private employers provide domestic partner benefits and more than eighty percent of the Fortune 500 companies include sexual orientation in corporate non-discrimination policies.<sup>44</sup> A significant number of sexual minorities are successfully pursuing elected office,<sup>45</sup> a career path unheard of two decades ago.

Of the forty-seven states with hate crime laws, twenty-nine states and the District of Columbia enhance sentences for crimes motivated by hatred towards the victim's sexual orientation, and eight of those and the District of Columbia enhance sentencing for crimes fueled by gender identity animosity.<sup>46</sup>

The rights and benefits available to sexual minorities today depend on where they live and work, making comprehensive equality a yet unattained goal. As Professor Rivera reflected in 1999, this patchwork protection includes many legal advancements for sexual minorities compared to slightly more than one generation ago, but still left her to ponder whether "the glass may be half empty rather than half full."<sup>47</sup>

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43. See HRC, Workplace, NONDISCRIMINATION LAWS: STATE BY STATE, [http://www.hrc.org/Template.cfm?Section=Get\\_Informed2&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=20650](http://www.hrc.org/Template.cfm?Section=Get_Informed2&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66&ContentID=20650) (last visited Feb. 18, 2006); LAMBDA LEGAL DEFENSE AND EDUCATION FUND ("LLDEF"), THE RIGHTS OF LGBT PUBLIC EMPLOYEES, <http://www.lambdalegal.org/cgi-bin/iowa/news/fact.html?record=1871> (visited Feb. 18, 2006); see also Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L. J. 145, 163 (2005) (recounting the "radical change regarding the legal rights of sexual minorities in the workplace" during the last fifty years).

44. See HRC, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER AMERICANS 32 (2004), available at [http://www.hrc.org/Content/ContentGroups/Publications1/State\\_of\\_the\\_Workplace/Workplace0603.pdf](http://www.hrc.org/Content/ContentGroups/Publications1/State_of_the_Workplace/Workplace0603.pdf) (finding that about ten percent of Fortune 500 companies include transgender people in their antidiscrimination policies); see also LLDEF, OUT AT WORK: A GUIDE FOR LGBT EMPLOYEES 26-33 (2004), available at <http://www.lambdalegal.org/cgi-bin/iowa/news/publications.html?record=1493>.

45. See Christopher Lisotta, *Ballot Box Trailblazers*, ADVOCATE, June 21, 2005, at 106, 112 (profiling Dallas County Sheriff Lupe Valdez and other sexual minorities elected to public office in Texas, Georgia, Idaho, Kansas and elsewhere, and noting that such officials are currently found in all but ten states).

46. See HRC, EQUALITY FROM STATE TO STATE: GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS AND STATE LEGISLATION 2004, available at [http://www.hrc.org/Content/ContentGroups/Publications1/Equality\\_State\\_by\\_State.pdf](http://www.hrc.org/Content/ContentGroups/Publications1/Equality_State_by_State.pdf).

47. Rhonda R. Rivera, *Our Straight Laced Judges: Twenty Years Later*, 50 HASTINGS L.J. 1179, 1187 (1999) [hereinafter Rivera, *Twenty Years Later*]. Other long-term observers of the LGBT rights movement, including this author, remain more optimistic. See, e.g., Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?*, 9 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 207 (2003) (articulating an optimistic yet admittedly uncertain view of the future in terms of the continued

### 3. *Shifts in Public Opinion*

In dissenting from the Supreme Court's extension of privacy rights to sexual minorities in the *Lawrence* case, Justice Antonin Scalia opined that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home."<sup>48</sup> Rather, Justice Scalia continued, most U.S. citizens prefer to "protect[] themselves and their families from a lifestyle that they believe to be immoral and destructive."<sup>49</sup>

Justice Scalia's assessment of public attitudes towards sexual minorities at the dawn of the twenty-first century is not accurate. While it may be true, as Catharine MacKinnon posits, that sexual minorities are "among the most stigmatized, persecuted, and denigrated people on earth,"<sup>50</sup> public opinion about sexual minorities has improved vastly in recent decades.<sup>51</sup> In a nationwide poll conducted in April 2005, for example, twenty-seven percent of respondents believed that same-sex couples should be allowed to marry and an additional twenty-nine percent believed that civil unions were appropriate,<sup>52</sup> meaning that fifty-six percent of respondents favored legal recognition of same-sex relationships.<sup>53</sup>

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extension of civil rights to sexual minorities).

48. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J. dissenting).

49. *Id.*

50. CATHARINE A. MACKINNON, *SEX EQUALITY* 1057 (2003); see also KAISER FAMILY FOUNDATION ("KFF"), *VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION SURVEY* (2000), available at [www.kff.org/healthpollreport/archive\\_Dec2002/3.cfm](http://www.kff.org/healthpollreport/archive_Dec2002/3.cfm) (identifying in a nationwide survey that adults viewed gay men and lesbian women as suffering the most prejudice and discrimination in this country, followed by Blacks, Hispanics and the disabled).

51. Public opinion poll results are influenced by the phrasing of a question, the order in which questions are asked, the size and location of the respondent pool and myriad other factors. See generally FRANK NEWPORT, *POLLING MATTERS: WHY LEADERS MUST LISTEN TO THE WISDOM OF THE PEOPLE* (2004) (explaining the polling process). While not an exact science, well constructed and conducted polls provide keen insights into the public psyche. See Bill Sloat, *Taking the Pulse of the Nation*, *PLAIN DEALER* (Cleveland), Oct. 3, 2004, (Sunday Magazine), at 11. Interpreting survey data dealing with sexual minorities can be especially challenging. See GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS: PUBLIC POLICY, PUBLIC OPINION, AND POLITICAL REPRESENTATION 89-169 (Ellen D.B. Riggle & Barry L. Tadlock eds., 1999) (explaining the relationship between respondents' demographic characteristics and survey responses, the potential conflicting interpretations of survey data related to sexual minorities, and the relationship between public opinion and voting behavior on gay and lesbian rights and related matters).

52. See PollingReport.com, Law and Civil Rights, ABC News/Washington Post Poll, Apr. 21-24, 2005, <http://www.pollingreport.com/civil.htm> (last visited Mar. 19, 2005); see also PollingReport.com, Law and Civil Rights, CBS/New York Times Poll, Feb. 24-28, 2005, <http://www.pollingreport.com/civil.htm> (last visited Mar. 19, 2005) (showing that twenty-three percent of adults nationwide favor same-sex marriage and an additional thirty-four percent favor civil unions).

53. These numbers help explain why fourteen state legislatures resisted pressure

In terms of employment, the number of respondents to nationwide polls who believed that homosexuals should have equal job opportunities rose from fifty-six percent in 1977 to between eighty-seven and ninety percent in 2004.<sup>54</sup> More than three-quarters of respondents support enactment of laws or policies that protect gay men and lesbians against discrimination in employment.<sup>55</sup> Almost eighty percent of respondents believe that openly gay and lesbian people should be able to serve in the military.<sup>56</sup>

Between 1992 and 2005, the number of respondents who approved hiring homosexuals as medical doctors increased from fifty-three to seventy-eight percent; approval of hiring homosexuals as clergy rose from forty-three to forty-nine percent; approval of hiring homosexuals as elementary school teachers climbed from forty-one to fifty-four percent; approval of hiring homosexuals as high school teachers soared from forty-seven to sixty-two percent; and approval of hiring homosexuals as members of the President's cabinet grew from fifty-four to seventy-five percent.<sup>57</sup> And contrary to Justice Scalia's views, a significant majority of U.S. residents would allow their children to attend a high school or grade school where the teacher was openly gay or lesbian.<sup>58</sup>

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to amend state constitutions to ban same sex marriage in 2004, with six more following suit as of May 2005. See HRC, *THE BACKLASH MYTH: PROGRESS TOWARD GAY, LESBIAN, BISEXUAL AND TRANSGENDER EQUALITY SINCE MAY 17, 2004* 2 (2005) [hereinafter HRC, *THE BACKLASH MYTH*].

54. See *Homosexual Relations*, GALLUP POLL NEWS SERVICE, Aug. 30, 2005, available at <http://poll.gallup.com/content/default.aspx?CI=1651> (explaining that because of an apparent difference in wording, eighty-seven percent agreed that "homosexuals" should have equal job opportunities, while ninety percent agreed when the same question was posed about "gays and lesbians").

55. See KAISER FAMILY FOUNDATION, *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* 8 (2001) [hereinafter *INSIDE-OUT*], available at <http://www.kff.org/kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf>.

56. *Homosexual Relations*, GALLUP POLL NEWS SERVICE, *supra* note 54 (reporting results of a May 2005 poll that showed seventy-six percent favored gay and lesbian soldiers openly serving in the U.S. military).

57. See Lydia Saad, *Gay Rights Attitudes a Mixed Bag: Broad Support for Equal Job Rights, But Not for Gay Marriage*, GALLUP POLL NEWS SERVICE, May 20, 2005, available at <http://poll.gallup.com/content/default.aspx?ci=16402&pg=1> (reporting that the 2005 approval ratings for homosexuals working in various professions were several percentage points below the 2004 numbers). This decrease may be due to the legalization of same-sex marriage in Massachusetts and the anti-gay crusade being orchestrated throughout this country in response. *Id.* One pollster theorizes that child sex abuse scandals in the Catholic Church "may have spilled over into attitudes about homosexuals serving as teachers or clergy." *Id.* Whatever the cause, these slight declines represent the recurring setbacks that the sexual minorities routinely face, and must overcome. See *infra* Part I.B.

58. *Cf.* Saad, *supra* note 57 (stating that seventy-one percent of respondents to a nationwide poll support hiring of gay or lesbian high school teachers and sixty-four

*B. The Relationship of Setbacks and Success*

[B]acklash itself . . . points to the success of the movement, not its failure.<sup>59</sup>

Proclamations that the sky is falling on the sexual minorities' civil rights movement<sup>60</sup> prove specious when evaluated from the long-term perspective. Sexual minorities recorded many of their legal and social victories while enduring hostile political climates and encountering contrary events that collectively equal, if not exceed, today's noxious atmosphere for civil rights.<sup>61</sup>

From a legal standpoint, for example, the Supreme Court's 1986 decision in *Bowers v Hardwick*<sup>62</sup> dealt sexual minorities a stunning setback. *Bowers* explicitly condoned criminal prosecution for sexual minorities who engaged in adult, private, consensual sex: in so doing, the decision implicitly authorized states to continue discriminating against homosexuals in child custody, visitation, employment, housing and many other areas.<sup>63</sup> As the Supreme Court acknowledged in overturning *Bowers* in 2003, the stigma attached to the criminalization of homosexual conduct served as "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."<sup>64</sup> Nonetheless, sexual minorities recorded many major victories during the seventeen years when discrimination against them carried the imprimatur of the highest Court in the land.<sup>65</sup>

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percent support hiring of gay or lesbian elementary school teachers).

59. RUDACILLE, *supra* note 36, at 152. *But see* THE BACKLASH MYTH, *supra* note 53 (arguing that no backlash against gays and lesbians has occurred).

60. *See, e.g.*, Stevenson Swanson, *In Other States, Opposition Solidifies: In the Year Since the 1st State Legalized Same-Sex Weddings, the Backlash Has Been Widespread*, CHI. TRIB., May 17, 2005, at C1 (basing the claim that "the backlash has been widespread" on same-sex marriage bans passing in fourteen states between May 2004 and 2005).

61. Progress and regression in the movement have been chronicled in *The Advocate*, a now-weekly news magazine, since the late 1960s. *See generally* WITNESS TO REVOLUTION: *THE ADVOCATE* REPORTS ON GAY AND LESBIAN POLITICS, 1967-1999 (Chris Bull ed., 1999) [hereinafter WITNESS TO REVOLUTION] (reprinting the full text of select articles).

62. 478 U.S. 186, 195-96 (1986) (upholding a Georgia law banning sodomy). The Court affirmed a similar decision a decade earlier. *See Doe v. Commonwealth's Attorney for Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd*, 425 U.S. 901 (1976).

63. *See* Lawrence v. Texas, 539 U.S. 558, 590 n.2 (2003) (Scalia, J., dissenting).

64. *Id.* at 575.

65. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996) (holding that a state cannot deem sexual minorities "a class of persons" who are strangers to the law); Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1547-48 (11th Cir. 1997) (striking down an Alabama statute that disallowed funding and recognition to any organization that promoted a homosexual lifestyle because it violated the First Amendment rights

The AIDS pandemic that exploded in the early 1980s,<sup>66</sup> resisted containment throughout the 1990s,<sup>67</sup> and continues to claim untold numbers of victims today<sup>68</sup> similarly produced significant legal and social setbacks. AIDS has devastated families and communities, demanded major realignment of resources to fight for research and treatment and to challenge discriminatory practices against those infected with the virus, and reinforced the stereotype of sexual

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of the student groups); *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) (upholding the right of a student to pursue a claim against the school district for failing to protect the student from sexual orientation harassment); *Stemler v. Florence*, 126 F.3d 856, 873-74 (6th Cir. 1996) (finding a violation of the Equal Protection clause when three police officers selectively arrested and prosecuted a woman based on her sexual orientation); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1290 (D. Utah 1998) (concluding that a lesbian teacher's rights to free speech and equal protection were violated by the district's termination of her coaching assignment); *Powell v. State*, 510 S.E.2d 18, 23-25 (Ga. 1998) (striking down the Georgia sodomy statute that was upheld in *Bowers v. Hardwick* because it violated the state constitution's right to privacy); *Commonwealth v. Wasson*, 842 S.W.2d 487, 493, 500 (Ky. 1993) (striking down a state sodomy statute because it violated state constitutional guarantees of privacy and equal protection); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (recognizing that a lesbian couple had formed a family that entitled one same-sex partner to visit their children following termination of the parents' relationship); *In re Matter of Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) (permitting a lesbian to adopt her partner's child, thus vesting full parental rights in both women); *Braschi v. Stahl Ass'n Co.*, 543 N.E.2d 49, 53-54 (N.Y. 1989) (classifying same-sex lifetime partners as "family" for purposes of rent control laws); *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 524-25 (Or. App. 1998) (requiring a university to extend insurance benefits to same-sex domestic partners); *Dallas v. England*, 846 S.W.2d 957, 958 (Tx. Ct. App. 1993) (holding a sodomy statute unconstitutional and prohibiting the city from refusing to hire lesbians and gay men for the police force); *Baker v. Vermont*, 744 A.2d 864, 866 (Vt. 1999) (holding that the Vermont state constitution requires equal treatment of same-sex couples and opposite-sex couples).

66. For an excellent discussion of the impact of AIDS on individual activists and the movement from the early 1980s to early 1990s, see ERIC MARCUS, *MAKING GAY HISTORY: THE HALF-CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS* 243-341 (2002).

67. See Chris Bull & John Gallagher, *The Lost Generation: A Second Wave of HIV Infections Among Young Gay Men Leaves Educators Worried About the Future of the Epidemic*, *ADVOCATE*, May 31, 1994, at 36.

68. See DEP'T OF HEALTH & HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION, *A GLANCE AT HIV/AIDS AMONG MEN WHO HAVE SEX WITH MEN*, Jan. 2006, available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/MSMGlance.pdf> (reporting that more than half a million men in the United States who have had sex with other men have been diagnosed with AIDS, that almost three-hundred thousand of them have died in the past two decades, and that almost seventy percent of U.S. males diagnosed with HIV in 2004 were likely infected through having sex with other males); see also UNITED NATIONS, UNAIDS/WHO, *AIDS EPIDEMIC UPDATE: DECEMBER 2005*, available at [http://www.unaids.org/epi/2005/doc/EPIupdate2005.pdf\\_en/Epi0502en.pdf](http://www.unaids.org/epi/2005/doc/EPIupdate2005.pdf_en/Epi0502en.pdf) (estimating that 40.3 million people worldwide are infected with HIV, that 4.9 million of them were infected in 2005, and that 3.1 million people died from AIDS in 2005). Medical reports released in March 2005 claimed that a gay man in New York displayed symptoms of a new and more virulent form of HIV. See, e.g., Marc Santora, *Rare AIDS Strain is Very Aggressive, Study Says*, *N.Y. TIMES*, March 18, 2005, at B3. Those reports resulted in a new round of criticism aimed at gay men but ultimately the reports were discredited. See, e.g., Charles Piller, *AIDS Experts Awaken to a False Alarm: A Warning of a Virulent New Strain in New York didn't Pan Out, and the Messengers Feel the Heat*, *L.A. TIMES*, June 5, 2005, at A-28.

minorities, especially gay men, as sexually promiscuous and socially irresponsible.<sup>69</sup> Despite the ongoing legal, political and personal ramifications that the AIDS epidemic heaped on sexual minorities,<sup>70</sup> it also galvanized activists to fight for research dollars, compassionate and nondiscriminatory treatment of AIDS victims, and public education about the disease and the people it afflicted.

The sexual minority civil rights movement has also progressed despite (1) its uniqueness, (2) attempts at inclusiveness, (3) major disagreements among its advocates and (4) decades of heightened U.S. socio-political conservatism.

The challenges of uniqueness are illustrated by “[t]he kinds of oppression that homosexuals have experienced, the role that religion played in it, the psychological effect of it, the way gay men and lesbians [and bisexual and transgender persons] do and don’t relate to each other, the fractious nature of the movement, [and] its difficulty in finding leaders and a voice.”<sup>71</sup> The emancipatory trails blazed by women and black people in this country provided useful guideposts for sexual minority advocates,<sup>72</sup> but the distinguishing characteristics of each civil rights movement necessitated construction of divergent road maps.<sup>73</sup>

The second dynamic, the movements’ attempts at inclusion, has made charting that course all the more difficult.<sup>74</sup> Activists questioned whether the movement would be defeated by its own

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69. Recent reports of gay men using illegal drugs and engaging in unprotected sex has created new health concerns among sexual minorities and has generated publicity bolstering stereotypes of sexual minorities as socially irresponsible and sexually promiscuous. See, e.g., Stephen Smith, *Crystal Meth Threat Growing: Gays’ Use in N.E. Fueling HIV Fears*, B. GLOBE, Apr. 24, 2005, at A1.

70. See generally AIDS, IDENTITY, AND COMMUNITY: THE HIV EPIDEMIC AND LESBIANS AND GAY MEN (Gregory M. Herek & Beverly Greene eds., 1995).

71. DUDLEY CLENDINEN & ADAM NAGOURNEY, OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA 13 (1999) (bracketed words supplied).

72. See CAIN, *supra* note 22, at 12-44, 69-71 (summarizing racial and gender civil rights movements and noting how lawyers for lesbian and gay people relied on legal strategies developed by lawyers working on other causes).

73. See William B. Turner, *Mirror Images: Lesbian/Gay Civil Rights in the Carter and Reagan Administrations*, in CREATING CHANGE, *supra* note 21, at 26 (arguing that sexual minority activists cannot “simply plug ‘sexual preference’ or ‘sexual orientation’ into a receptacle built for ‘race’ and ‘sex,’” especially when lobbying for inclusion in anti-discrimination laws); see also CAIN, *supra* note 22, at 277-82.

74. See *The Membership Pledge of the Mattachine Society – April 1951*, in MARK BLASIOUS & SHANE PHELAN, WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 284 (1997), reprinted in THE GAY RIGHTS MOVEMENT 52-53 (Jennifer Smith ed., 2003) (explaining that as early as 1951, for example, members of the gay rights group known as the Mattachine Society promised “in every possible way, to respect the rights of all racial, religious, and national minorities” and try “to interest other responsible people” in the organization “without regard to their race, color, or creed”).

diversity<sup>75</sup> even while reveling in the glow of the Stonewall riots that inspired the modern “gay liberation” movement.<sup>76</sup> Dissonance has been recorded in the clashes between male and female activists,<sup>77</sup> by racial divides,<sup>78</sup> and by the conflicting visions of homosexual, bisexual<sup>79</sup> and transgender leaders.<sup>80</sup> Matters of class, gender, religion, political ideology, goals and priorities have historically divided the movement<sup>81</sup> and continue to do so.<sup>82</sup>

The third feature, closely related to the second, is the diversity of thought that destabilizes consensus on key strategic issues. Recurring conflict arises over whether equality is best achieved by quietly advocating for small and incremental steps or by aggressively

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75. See Lige Clark & Jack Nichols, *N.Y. Gays: Will the Spark Die?*, ADVOCATE, Sept. 1969, reprinted in WITNESS TO REVOLUTION, *supra* note 61, at 15.

76. See generally MARTIN DUBERMAN, STONEWALL (1984); MARCUS, *supra* note 66, at 121-23, 126-32; Dick Leitsch, *Police Raid on N.Y. Club Sets off First Gay Riot*, ADVOCATE, Sept. 1969, in WITNESS TO REVOLUTION, *supra* note 61, at 11 (describing how gay and transgender patrons of the Stonewall bar in New York City’s Greenwich Village physically confronted the police who tried to arrest them on June 23, 1969, triggering several days of intermittent rioting); KAY TOBIN & RANDY WICKER, THE GAY CRUSADERS 9 (Arno Press Inc. 1975) (1972) (arguing that this radical rebellion served as a flash point for the nascent movement, sparking “the birth of gay pride on a massive scale”). Transsexuals also participated in and were inspired by the riots. *Id.*; RUDACILLE, *supra* note 36, at 151-78. The Stonewall riots caused “thousands of people” to come out of the closet and resulted in the permanent establishment of gay rights groups. See ESKRIDGE AND HUNTER, *supra* note 20, at 224. In fact, within three years of Stonewall more than three-hundred organizations were advocating equal rights for sexual minorities. See TOBIN & WICKER, *supra* note 76, at 9.

77. The Daughters of Bilitis and other lesbian organizations originated and thrived in the 1950s due to the women’s perception that “[t]he male-oriented gay groups wanted [women] in as secretaries, coffee makers, and hostesses,” and that lesbians “would have had to fight tooth and toenail to get into any policy-making positions” in the male organizations. TOBIN & WICKER, *supra* note 76, at 51-52 (quoting Del Martin, the assistant editor of the first lesbian magazine, *The Ladder*); see also CLENDINEN & NAGOURNEY, *supra* note 71, at 85-105 (addressing the conflicts between men and women in the movement in the 1970s).

78. See generally DANGEROUS LIAISONS: BLACKS, GAYS, AND THE STRUGGLE FOR EQUALITY (Eric Brandt ed., 1999); Cathy J. Cohen, *Contested Membership: Black Gay Identities and the Politics of AIDS*, in CREATING CHANGE, *supra* note 21, at 382.

79. See RUTH COLKER, HYBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996); Rebecca Shuster, *Beyond Defense: Considering Next Steps for Bisexual Liberation*, in BI ANY OTHER NAME: BISEXUAL PEOPLE SPEAK OUT 266, 268-70 (Loraine Hutchins & Lani Kaahumanu eds., 1991) [hereinafter BI ANY OTHER NAME] (discussing the marginalization of bisexuals, including rejection by homosexual communities).

80. See RUDACILLE, *supra* note 36, at 154-61, 168-72, 185-86 (reporting on long-standing tensions between gay and lesbian activists and transgender leaders); John Gallagher, *“For Transsexuals, 1994 is 1969”: Transgendered Activists are a Minority Fighting to be Heard Within the Gay and Lesbian Community*, ADVOCATE, Aug. 23, 1994, at 59.

81. See generally CLENDINEN & NAGOURNEY, *supra* note 71.

82. See Patrick J. Egan & Kenneth Sherrill, *Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays*, PS: POL. SCI. & POL., Apr. 2005, at 229, available at [www.apsanet.org/imgtest/PSApr05EganSherrill.pdf](http://www.apsanet.org/imgtest/PSApr05EganSherrill.pdf).



demanding immediate and full participation in society.<sup>83</sup> Diverse voices repeatedly spawn arguments “over which tactics are appropriate, over which politicians should be supported and which ones attacked, over which institutions should be challenged or ignored.”<sup>84</sup>

The final countervailing factor is wave after wave of political and social conservatism the movement has faced. The huge social-political change accomplished by black people and women throughout the 1960s and 1970s suggested that all minorities would soon be accorded full rights and benefits associated with U.S. citizenship. The promise of a truly egalitarian society came to a sudden halt, however, with the 1980 election of Republican President Ronald Reagan,<sup>85</sup> an event that signaled a return to right-wing politics and inspired conservative uprisings.<sup>86</sup>

The significant progress recorded despite considerable internal fragmentation and unrelenting external pressure proves that the sexual minority equality movement can move forward even as it stumbles. History also demonstrates that advocates dedicated to the cause can overcome whatever new challenges are thrown in their paths, and at times, even be inspired by them.<sup>87</sup>

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83. The clash of philosophies has intensified over same-sex marriage, with some activists advocating that domestic partnerships or civil unions should be sought first and others arguing that nothing short of marriage is appropriate. These contemporary disputes reflect long-standing philosophical quarrels on whether the movement should quietly strive for assimilation or make radical demands for immediate and equal rights. See, e.g., CLENDINEN & NAGOURNEY, *supra* note 71, at 28-32, 51-56 (discussing friction between the assimilation strategies of the Daughter of Bilitis and the Mattachine Society, both founded in the 1950s, the radical activism of the Gay Liberation Front, established in 1969 and the Gay Activists Alliance, created in 1970); Donald Webster Cory, *Changing Attitudes Toward Homosexuals*, in *HOMOSEXUALITY: A CROSS CULTURAL APPROACH* 427, 435-36 (Donald Webster Cory ed., 1956) (discussing the gap between homosexuals who prefer to remain invisible to avoid backlash and those who embrace militancy).

84. TOBIN & WICKER, *supra* note 76, at 10.

85. See, e.g., Larry Bush & Richard Goldstein, *A Chill Wind for Gay Rights: Where Have All the Liberals Gone?*, *ADVOCATE*, July 9, 1981, at 17, 18 (reporting on the high level of hostility directed at sexual minorities due to the growing political strength of Christian conservatives and newly-elected President Ronald Reagan's belief that “in the eyes of the Lord,” homosexuality is “an abomination”).

86. Although providing a brief respite, it is difficult to characterize the two-term presidency of William Clinton as reversing the trend toward conservative views. Clinton backed down on his promise to end the military ban against homosexual service members and also signed the Defense of Marriage Act (DOMA) into law, codifying the federal government's discriminatory stance against same-sex couples and allowing states to exhibit the same discrimination with impunity. See Craig A. Rimmerman, *A “Friend” in the White House? Reflections on the Clinton Presidency*, in *CREATING CHANGE*, *supra* note 21, at 43, 46-49, 51-52.

87. See, e.g., Joe Dignan, *Big Show of Fence Mending: HRC Joins 21 Other National LGBT Groups in Tele-Conference Announcing Statement of Purpose*, *GAY CITY NEWS*, Jan. 13-19, 2005, available at [http://www.gaycitynews.com/gcn\\_355/bigshowoffence.html](http://www.gaycitynews.com/gcn_355/bigshowoffence.html) (reporting that “after [the] fractious two months of controversy”

## II. SEPARATION OF FACT AND FICTION

Despite the many countervailing forces outlined in Part I, the sexual minority civil rights movement “has come further and faster, in terms of change, than any other that has gone before it in this nation.”<sup>88</sup> Why does the equal rights movement for sexual minorities continue to advance despite its internal struggles and external resistance? Two independent yet intersecting phenomena—behavior-identity compression and transformative learning—help answer that question.

*A. Behavior-Identity Compression*

If we [could] separate sexual behavior from the identity of the people who are in gay families, I think we’d be a lot better off.<sup>89</sup>

Classification of sexual minorities as “homosexuals,” “lesbians” and “transgender” stems from socio-scientific constructs of sexual personalities.<sup>90</sup> “These social categories . . . are artifacts of particular prevalent belief systems and of their apparatuses of societal control”<sup>91</sup> that predate the founding of this country. The extent of contemporary discrimination against sexual minorities in law, religion, science and other intersecting disciplines is explained by

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that followed the 2004 November elections, the major national advocacy groups released a joint statement providing a roadmap for reaching key goals); Peter Freiberg, *The March on Washington: Hundreds of Thousands Take the Gay Cause to the Nation’s Capitals*, ADVOCATE, Nov. 10, 1987, at 11, 17, 20 (identifying the Reagan Administration’s disregard of the AIDS crisis as a major motivation for people marching on Washington); Peter Freiberg, *Supreme Court Decision Sparks Protests: “New Militancy” Seen in Angry Demonstrations*, ADVOCATE, Aug. 5, 1986, at 12, 12-13 (reporting on heightened activism following the Supreme Court’s *Bowers v. Hardwick* decision); John Gallagher, *California Explodes After Governor Kills Workplace Bias Ban*, ADVOCATE, Nov. 5, 1991, at 16 (quoting the Executive Director of the Los Angeles Gay and Lesbian Community Services Center’s characterization of the veto of pro-gay legislation by a governor who had indicated some support for it as “Stonewall II”).

88. CLENDINEN & NAGOURNEY, *supra* note 71, at 13.

89. Adam B. Vary, *The Battle for Kids’ TV*, ADVOCATE, Mar. 15, 2005, [http://www.findarticles.com/p/articles/mi\\_m1589/is\\_2005\\_March\\_15/ai\\_n13606931/print](http://www.findarticles.com/p/articles/mi_m1589/is_2005_March_15/ai_n13606931/print) (quoting Gillian Pieper, who described the controversy in which she, her lesbian partner and their three children were enveloped after appearing on the “Sugartime!” episode of the children’s television show, *Postcards from Buster*).

90. See generally 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 42-43 (Robert Hurley trans., 1990) (1978); CELIA KITZINGER, *THE SOCIAL CONSTRUCTION OF LESBIANISM* (Kenneth Gergen & John Shotter eds., 1987); Larry Cata Backer, *Constructing a “Homosexual” For Constitutional Theory: Sodomy Narrative, Jurisprudence, and Antipathy in United States and British Courts*, 71 TUL. L. REV. 529 (1996).

91. Francisco Valdes, *Keynote Address: Recalling Race, Gender and Sexuality: OutCrit Reflections on Legal Education, Social Identities and the “Rule of Law” – A Call Toward Collective Insurrections*, 5 GEO. J. GENDER & L. 881, 884 (2004).

reference to the archaic, EuroAmerican-heteropatriarchal roots of sexual minority identity.<sup>92</sup> These historic and deeply imbedded roots also explain why this iniquitous identity is so difficult to deconstruct.<sup>93</sup>

As I conceive this phenomenon, behavior-identity compression is the process through which individuals within the heteronormative, binary sexual paradigm craft an identity for outsiders as one-dimensional sexual deviants. This socially constructed, multi-step progression encourages the compounding of erroneous assumptions and “contradictory misconceptions”<sup>94</sup> at each stage, yielding a composite identity that reinforces derogatory stereotypes of sexual minorities and justifies legal disenfranchisement, social contempt, criminal prosecution and physical violence against them.<sup>95</sup>

### *1. Construction of an Iniquitous Identity for Sexual Minorities*

In the first stage of behavior-identity compression, certain sexual conduct—such as sodomy or oral sex—is branded deviant, immoral and a threat to civilized society. Persons from respected disciplines such as psychology and medical science<sup>96</sup> join religious leaders<sup>97</sup> and

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92. See *id.* at 884 (asserting that EuroAmerican-heteropatriarchy “encapsulates not only the national chauvinisms of Europe and its colonial powers but also their particular brands of beliefs regarding race, ethnicity, gender, sexuality, economic relations and similar fault lines of societal organization”). In the United States, the law has played a major role in creating group identities based on such beliefs. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 423-39 (2001) (providing a “sociological-type model” of the law’s influence on the creation of group identities).

93. See generally John D’Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States 1940-1970* (2d ed. 1998); Carole S. Vance, *Social Construction Theory: Problems in the History of Sexuality*, in *HOMOSEXUALITY, WHICH HOMOSEXUALITY?: INTERNATIONAL CONFERENCE ON GAY AND LESBIAN STUDIES 13* (Dennis Altman et al. eds., 1989); Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 Va. L. Rev. 1721 (1993); Kenneth L. Karst, *Myths of Identity: Individual and Group Portrait of Race and Sexual Orientation*, 43 UCLA L. Rev. 263 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 Cal. L. Rev. 1 (1995).

94. John Addington Symonds, *A Problem in Modern Ethics*, in *HOMOSEXUALITY: A CROSS CULTURAL APPROACH*, *supra* note 83, at 12.

95. See *VIOLENCE AND SOCIAL INJUSTICE AGAINST LESBIAN, GAY AND BISEXUAL PEOPLE* 5-68 (Lacey M. Sloan & Nora S. Gustavsson eds., 1998) (explaining the relationship between the social disenfranchisement of and violence against sexual minorities, including intersexed and transgender adults, and gay and lesbian youth).

96. Science’s influence on this topic is curious because the appropriateness of particular sexual acts in a given society are “based on value judgments about the worth or morality of this behavior,” rather than on the empirical evidence science usually demands prior to espousing any theory. See SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 231-32 (1996); see also Sarah H. Ramsey & Robert F. Kelly, *Social Science Knowledge in Family Law Cases: Judicial Gate-Keeping in the Daubert Era*, 59 U. MIAMI L. REV. 1, 4 (2004) (explaining that science requires “a method of producing knowledge in which general statements—hypotheses and theories—are tested empirically under controlled conditions”).

other moralists to promote the pejorative—and even criminal—classification of these behaviors. The immorality of these acts becomes widely embedded in the culture.<sup>98</sup>

Second, all sexual minorities are assumed to engage in this “deviant” sexual behavior.<sup>99</sup> No empirical confirmation is offered or requested.<sup>100</sup> Contrary empirical data demonstrating that people who identify as “normal” heterosexuals engage in the condemned behavior is conveniently ignored.<sup>101</sup> Governmental policy and public opinion about sexual minorities are “unsupported by scientific research or basic logic,”<sup>102</sup> but are justified because so-called “homosexual practices” are classified “under the shadow of abnormality.”<sup>103</sup>

Third, due to their immoral and abnormal status, additional assumptions about sexual minorities’ personalities and behaviors are thoughtlessly accepted as fact.<sup>104</sup> The assumption that sexual

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97. See DONALD J. WEST, *HOMOSEXUALITY* 85 (1955) (asserting that Christianity stayed “a step ahead” of medical explanations for homosexuality by labeling sexual deviation “as just another instance of the many ‘evil’ impulses with which mankind is naturally endowed”).

98. See, e.g., Joseph Carroll, *Society’s Moral Boundaries Expand Somewhat This Year*, GALLUP POLL NEWS SERVICE, May 16, 2005, available at <http://poll.gallup.com/content/default.aspx?CI=16318> (reporting that fifty-two percent of adults believe that homosexual behavior is morally wrong); *INSIDE-OUT*, *supra* note 55, at chart 13 (reporting that fifty-one percent of respondents to a nationwide poll either completely agree or somewhat agree that homosexual conduct is immoral).

99. See Symonds, *supra* note 94, at 10 (describing the misconception “that one . . . unmentionable act is what the lovers seek as the source of their unnatural gratification”).

100. See *id.* (contradicting the belief that all homosexuals engage in the same sexual behavior).

101. See, e.g., Tori DeAngelis, *Our Erotic Personalities Are as Unique as Our Fingerprints: Research Debunks Long-held Notions About Sexual Orientation*, 32 *MONITOR ON PSYCHOL.* 35 (2001), available at <http://www.apa.org/monitor/apr01/erotic.html> (reporting that “hundreds of studies” consistently demonstrate “that people display a range of sexual and affectional proclivities”); Richard C. Friedman & Jennifer I. Downey, *Homosexuality*, 331 *NEW ENG. J. MED.* 923, 924 (1994) (concluding that “[d]iverse sexual practices occur in different groups regardless of sexual orientation”); Clara Thompson, *Changing Concepts of Homosexuality in Psychoanalysis*, 10 *PSYCHIATRY* 183, 188 (1947) (observing that “[t]here are at least as many different types of homosexual behavior as of heterosexual”).

102. John G. Culhane, *Bad Science, Worse Policy: The Exclusion of Gay Males from Donor Pools*, 24 *ST. LOUIS U. PUB. L. REV.* 129, 130 (2005).

103. WEST, *supra* note 97, at 94.

104. See *id.* (observing that historic treatment of sexual minorities “is explainable only by unfounded assumptions”); see also Symposium, *Homosexuality: Truth Be Told*, 14 *REGENT U. L. REV.* 241-511 (2001-2002). Published by a Christian affiliated law school, this symposium issue contains numerous articles asserting as “fact” many stereotypes long rejected by medical and social scientists, including the myth that homosexuals are child molesters, *id.* at 278, that “homosexuality is correlated with a disorder,” *id.* at 286, and that homosexuals actively recruit youths. *Id.* at 296. The Christian Right also attacks transsexual and transgender persons based on similar false assumptions about their identities and behaviors. See, e.g., TRADITIONAL VALUES

minorities promiscuously engage in deviant sexual conduct is taken as fact.<sup>105</sup> The assumptions that sexual minorities molest children, recruit youths and even persuade vulnerable adults to change their sexual orientation are taken as fact.<sup>106</sup> The assumptions that sexual minorities are inherently defective<sup>107</sup> and untrustworthy are taken as facts.<sup>108</sup> The assumption that sexual minority status is a choice that individuals can reject by simply abstaining from the “immoral” sexual behaviors is also taken as fact.<sup>109</sup>

In the fourth stage, false assumptions are packaged as a comprehensive and deviant “lifestyle” assigned to all sexual minorities. This consolidation supports but one conclusion: sexual minorities are sick and evil individuals, unworthy of the rights and privileges automatically accorded others in a civilized society.<sup>110</sup> Accordingly, the basic civil rights sexual minorities seek are “special” rather than “equal,”<sup>111</sup> and extension of such rights is contrary to society’s health

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COALITION: SPECIAL REPORT: A GENDER IDENTITY DISORDER GOES MAINSTREAM: CROSS-DRESSERS, TRANSVESTITES AND TRANSGENDERS BECOME MILITANTS IN THE HOMOSEXUAL REVOLUTION 1, 3, available at [http://www.traditionalvalues.org/pdf\\_files/TVCSpecialRptTransgenders1234.PDF](http://www.traditionalvalues.org/pdf_files/TVCSpecialRptTransgenders1234.PDF) (arguing that “transgenders are mentally disordered” persons who undermine society by “normalizing the abnormal”).

105. See Thompson, *supra* note 101, at 188.

106. See Nancy J. Knauer, *Homosexuality as Contagion: From the Well of Loneliness to the Boy Scouts*, 29 HOFSTRA L. REV. 401, 468-89 (2000); see also WEST, *supra* note 97, at 48-49. Promiscuity of sexual minorities is a favorite theme of conservative crusaders. See, e.g., Knauer, *supra* note 106, at 462. Characterization of homosexuals as child molesters has been authoritatively rebutted by empirical data. See Gregory M. Herek, Facts About Homosexuality and Child Molestation, <http://psychology.ucdavis.edu/rainbow/html/factsmolestation.html> (last visited Nov. 19, 2005) (refuting claims by psychologist Paul Cameron and others that homosexuals prey on children).

107. See, e.g., Carolyn Lochhead, *Conservatives Brand Homosexuality a “Tragic Affliction,”* S.F. CHRON., June 20, 1997, at A4.

108. Such assumptions fueled the witch hunts in the 1950s aimed at driving homosexuals out of the federal and state workforces and reverberate in today’s “don’t ask, don’t tell” military policy toward sexual minorities. See, e.g., *Perverts Called Government Peril*, N.Y. TIMES, Apr. 19, 1950, at 25 (reporting on the Republican National Chairman’s claims “that ‘sexual perverts who have infiltrated our Government in recent years’ were ‘perhaps as dangerous as the actual Communists’” due to their lack of trustworthiness); see also *Uniform Discrimination: The “Don’t Ask, Don’t Tell” Policy of the U.S. Military*, HUMAN RIGHTS WATCH, Jan. 2003, at 2-5 [hereinafter *Uniform Discrimination*] (concluding that the policy has intensified mistreatment and expulsion of sexual minority soldiers).

109. This belief explains Christian groups’ continued support of “conversion therapy” despite its rejection by mainstream mental health professionals. See Barry Yeoman, *Gay No More?*, PSYCHOL. TODAY, Mar./Apr. 1999, at 26 (questioning the validity of conversion therapy, a combination of psychotherapy and prayer which seeks to change a person’s sexual orientation); see also *infra* Part III.C.2.

110. See Carnahan, *supra* note 40, at 11-23 (describing custody and visitation decisions in which courts have relied on stereotypes about sexual minorities).

111. See Knauer, *supra* note 106, at 489-93; see also BULL & GALLAGHER, *supra* note 4, at 97-124.

and well-being.<sup>112</sup>

Fifth and finally, political and religious power brokers whose status and financial standing are enhanced by creating and exploiting societal rifts<sup>113</sup> re-image the deviant lifestyle as a socio-political group identity.<sup>114</sup> Political campaigns, conservative news media and Sunday sermons depict sexual minorities as enemies of the state, threats to families and an evil to be condemned by all normal, God-fearing citizens.

Behavior-identity compression is a powerful weapon, especially in the hands of conservative political forces. It allows lawmakers to enact discriminatory laws while arguing that such blatantly discriminatory legislation does not unfairly disadvantage anyone. Rather, they contend, the law serves society's best interest by refusing to condone a voluntary behavior that threatens the welfare of the state. Moreover, because the identity of the disenfranchised group is defined by voluntary behaviors, persons disadvantaged by the law can simply change their behavior and escape the law's wrath.

Behavior-identity compression similarly allows conservative religious leaders to claim that they are not condemning sexual minorities *per se*, but only the behavior in which these individuals engage. Behavior-identity compression allows conservative clergy to hide behind the mantra of "love the sinner, hate the sin,"<sup>115</sup> while actively campaigning for further disparate and degrading treatment of the individuals they purport to love.<sup>116</sup>

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112. *Notes on Homosexuality: Excerpts from a Consultation*, 58 SOCIAL PROGRESS 26, 29 (1967) (quoting University of Pennsylvania School of Medicine Associate Professor Samuel B. Hadden, who argued that "[t]he danger in homosexuality is part of an overall danger to our society and culture in that it gives the rights of the individual supersedence over the rights of the community in far too many instances"). Such arguments negate the "individual rights" cornerstone of the U.S. Constitution and ignores the Supreme Court's mandate that disenfranchisement of minorities due to unfounded prejudice is not a majoritarian/ community right. See *Romer v. Evans*, 517 U.S. 620, 634 (1996).

113. See Rob Boston, *The Religious Right's Gay Agenda*, CHURCH & ST., Oct. 1999, at 9, 10.

114. See generally Halley, *supra* note 93; Karst, *supra* note 93; Valdes, *supra* note 93.

115. See *Matthew* 9:14; *Mark* 2:17; *Luke* 5:32 (exhibiting the Biblical origins for the philosophy of "love the sinner, hate the sin").

116. See *A Thorn in Their Side: Mel White Was a Culture Warrior on the Religious Right – Until He Came Out*, INTELLIGENCE REP., Spring 2005, <http://www.splcenter.org/intel/intelreport/article.jsp?aid=525> (quoting Reverend Mel White, the founder of the gay Christian organization Soulforce, who explains "[y]ou can't love the sinner and hate the sin, when the sin is what I am") (emphasis in original). White believes that "love the sinner but hate the sin" means "I love you, but I have reservations," which actually means "I don't love you." *Id.* Failure to love your neighbor, of course, is contrary to Christian mores. See, e.g., THE HOLY SEE ARCHIVE, THE VATICAN: CATECHISM OF THE CATHOLIC CHURCH § 2196 (1994), available at <http://www.vatican.va/archive/ENG0015/P7Q.HTM> (identifying God's commandment to "love

*2. Fundamental Flaws Warranting Deconstruction of the Identity*

Behavior-identity compression is disingenuous for many reasons, some of which were noted in the proceeding section. In addition, since sexologist Alfred Kinsey's groundbreaking work on human sexuality in the late 1940s and early 1950s, researchers have documented that human beings engage in a wide range of sexual activities regardless of sexual orientation or identity.<sup>117</sup> Indeed, human sexual behavior and identity have proven more fluid than previously thought.<sup>118</sup>

In spite of history's attempt to first pathologize gay and lesbian sexuality and then to distinguish it clearly from other enactments of sexuality, the truth may be that it is not possible to categorize sexuality so easily. Developmental models and clear distinctions demarcating one sexual identity or orientation may be too confining for the ways in which humans grow into and enact sexuality. The complexity and multiplicity of sexuality may exceed either developmental or sexual identity theory.<sup>119</sup>

In short, it defies logic to condemn sexual minorities on the basis of sexual activity that cannot be associated exclusively with them, in which they may never have engaged,<sup>120</sup> and which may, or may not, change over the course of their lifetimes.<sup>121</sup>

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your neighbor as yourself" as one of the most important).

117. See ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953); ALFRED KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 638-41 (1948) (placing human sexual behavior on a continuum ranging from exclusively heterosexual to exclusively homosexual and reporting that adults often move on the continuum throughout their lives). More recent studies on the incidence of intimate same-sex encounters vary significantly, probably due to the questions used to solicit the data. Compare EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 294-96 (1994) (reporting that more than nine percent of men and four percent of women have engaged in same-sex behavior after puberty), with SAMUEL S. JANUS & CYNTHIA L. JANUS, *THE JANUS REPORT ON SEXUAL BEHAVIOR* 69 (1993) (describing a study in which "[t]wenty-two percent of the men and [seventeen percent] of the women said that they had had homosexual experiences").

118. See generally *LESBIAN, GAY, AND BISEXUAL IDENTITIES OVER THE LIFESPAN: PSYCHOLOGICAL PERSPECTIVES* (Anthony R. D'Augelli & Charlotte J. Patterson eds., 1995).

119. Kathleen Edwards & Ann K. Brooks, *The Development of Sexual Identity, in AN UPDATE ON ADULT DEVELOPMENT THEORY: NEW WAYS OF THINKING ABOUT THE LIFE COURSE* 49, 53 (M. Carolyn Clark & Rosemary S. Caffarella eds., 1999).

120. See Friedman & Downey, *supra* note 101, at 924 (stating, "[a] substantial minority of adults in the United States abstain from sex, regardless of sexual orientation").

121. See SIR JOHN WOLFENDON ET AL., *REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION* (1957) (acknowledging the concept of sexual fluidity). The Wolfendon Report's extensive analysis of homosexuality's affect on society noted that "[a]ccording to the psycho-analytic school, a homosexual component (sometimes conscious, often not) exists in everybody; . . . homosexuality in this sense is universal." *Id.* at 28. Accordingly, it was "abundantly confirmed by the evidence

Even if sexual conduct were a legitimate identifier for a distinct subset of humanity (which it is not), behavior identity compression is flawed due to its reduction of human beings to a single trait or behavior. In the legal arena, for example, state and federal anti-discrimination laws condemn disparate treatment based upon a single factor such as race, religion, sex or national origin. Similarly, religious groups—including congregants who once suffered discrimination because of their religious identity<sup>122</sup>—do not advocate social ostracism and legal disenfranchisement against people based on any other single “sin” for which human beings may have a propensity to engage.<sup>123</sup> Even the Roman Catholic Church recognizes that “[t]he human person . . . can hardly be adequately described by a reductionist reference to his or her sexual orientation.”<sup>124</sup>

Despite its fundamental flaws, behavior identity compression is neither a new nor easily unraveled phenomenon. Conservative leaders who greatly benefit from perpetuation of this myth refuse to acknowledge the inherent frailties of behavior-identity compression while myriad other forces are working to expose its many vulnerabilities. Somewhat amazingly, the forces working to dismantle behavior-identity compression emanate from the same popular culture, scientific and religious sources that originally conspired to create and propagate it. Transformative learning theory helps explain these dramatic reversals.

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submitted” that “homosexuality . . . [was] not an ‘all or none’ condition,” but rather “[a]ll gradations can exist from apparently exclusively homosexuality . . . to apparently exclusive heterosexuality.” *Id.* at 28-29.

122. See WILLIAM N. ESKRIDGE JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 293, 295 (1999) (observing that “religion and sexual orientation have much in common as identity categories” and “that antireligious prejudice is systematically similar to antigay prejudice”).

123. Extensive research failed to reveal, for example, instances of Christian coalitions lobbying state or federal representatives for laws disadvantaging divorcees, adulterers, fornicators, gluttons, substance abusers or others whose acts are considered sinful.

124. The Vatican Congregation for the Doctrine of the Faith, *Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, reprinted in *VOICES OF HOPE: A COLLECTION OF POSITIVE CATHOLIC WRITINGS ON GAY & LESBIAN ISSUES* 34 (Jeannine Gramick & Robert Nugent eds., 1995).



### B. Transformative Learning

We know from years of polling and focus groups that moving people along in accepting gay people is a series of steps. There is virtually no “aha!” moment where people flip from being antigay to pro-gay.<sup>125</sup>

#### 1. Theory Overview

Human beings never stop learning. Learning occurs instinctively<sup>126</sup> “as the brain extracts meaningful patterns from the confusion of daily internal and external experience.”<sup>127</sup> This means that “present interpretations of reality are always subject to revision or replacement.”<sup>128</sup> Although the evolution of adult thought has long been recognized, social scientists did not intensely focus on the processes and results of adult learning until the 1970s.<sup>129</sup> A multitude of theories about adult learning, or “andragogy,”<sup>130</sup> have since been proposed, critiqued, tested and refined.<sup>131</sup>

Andragogy recognizes “that as individuals mature . . . their self-concept moves from one of being a dependent personality toward being a self-directed human being.”<sup>132</sup> The roads taken and the

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125. Adam B. Vary, *The Brokeback Mountain Effect*, ADVOCATE., Feb. 28, 2006, at 36, 40 (quoting Matt Foreman, Executive Director of the National Gay and Lesbian Task Force).

126. See DOROTHY MACKERACHER, MAKING SENSE OF ADULT LEARNING 6 (2d ed. 2004).

127. *Id.* at 7.

128. JACK MEZIROW, TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING xiv (Alex B. Knox ed., 1991) [hereinafter MEZIROW, TRANSFORMATIVE DIMENSIONS].

129. See MALCOLM KNOWLES, THE ADULT LEARNER: A NEGLECTED SPECIES 27-63 (3d ed. 1984).

130. See MALCOLM S. KNOWLES, MODERN PRACTICE OF ADULT EDUCATION: FROM PEDAGOGY TO ANDRAGOGY 42-43 (rev. vol. 1980) [hereinafter KNOWLES, FROM PEDAGOGY TO ANDRAGOGY] (explaining that the term andragogy originated in Europe and defining it as “the art and science of helping adults learn”).

131. See generally SHARAN B. MERRIAM & ROSEMARY S. CAFFARELLA, LEARNING IN ADULTHOOD: A COMPREHENSIVE GUIDE 267-366 (2d ed. 1999) (explaining adult learning theories and criticisms of each).

132. KNOWLES, FROM PEDAGOGY TO ANDRAGOGY, *supra* note 130, at 44-45; see also MARCIA B. BAXTER MAGOLDA, KNOWING AND REASONING IN COLLEGE: GENDER-RELATED PATTERNS IN STUDENTS’ INTELLECTUAL DEVELOPMENT 29, 38, 47, 49, 56, 70-72 (1992) (identifying “four qualitatively different ways of knowing, each characterized by a core set of epistemic assumptions,” including absolute, transitional, independent and contextual knowing). The author concluded that learners move from being absolutely certain about what they know to becoming more independent and finally assembling information from diverse sources to apply in specific contexts. *Id.*; PATRICIA M. KING & KAREN STROHM KITCHENER, DEVELOPING REFLECTIVE JUDGMENT: UNDERSTANDING AND PROMOTING INTELLECTUAL GROWTH AND CRITICAL THINKING IN ADOLESCENTS AND ADULTS 44-74 (1994) (identifying seven stages of cognitive development from childhood through adulthood, starting with stages in which people do not question authority figures and in which all problems have a definite and correct answer, moving through stages marked by increased comfort with

results achieved in this maturation process are greatly affected by daily transformative learning experiences. Accordingly, the transformative learning experienced by individuals, organizations and groups<sup>133</sup> has become a central theme in adult learning theory.<sup>134</sup>

Transformative learning takes place “in the real world in complex institutional, interpersonal, and historical settings, and . . . must be understood in the context of cultural orientations embodied in our frames of reference.”<sup>135</sup> Like other forms of self-directed learning, transformative learning has as its goal, “the promotion of emancipatory learning and social action.”<sup>136</sup> In short, “[t]he goal of transformative learning is independent thinking.”<sup>137</sup>

Columbia University Professor Jack D. Mezirow “has been the primary architect and spokesperson” for transformative learning theory.<sup>138</sup> Transformative theory, according to Mezirow, “attempts to describe and analyze how adults learn to make meaning of their experience.”<sup>139</sup> Mezirow views learning “as the process of using a prior interpretation to construe a new or a revised interpretation of the meaning of one’s experience in order to guide future action.”<sup>140</sup>

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uncertainty and ambiguity, and ending when fully matured adults are receptive to creating and reevaluating knowledge to accommodate new situations).

133. See MEZIOROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at 185 (referring to such occurrences as “collective transformations”); Lisa M. Baumgartner, *An Update on Transformational Learning*, in THE NEW UPDATE ON ADULT LEARNING THEORY 15, 19-20 (Sharan B. Merriam ed., 2001).

134. See MERRIAM & CAFFARELLA, *supra* note 131, at 318-339; see also Edward W. Taylor, *Building Upon the Theoretical Debate: A Critical Review of the Empirical Studies of Mezirow’s Transformative Learning Theory*, 48 ADULT EDUC. Q. 34 (1997) (reviewing thirty-nine empirical studies that employed Mezirow’s model). Similar analyses of adult learning have been organized under the category of self-directed learning, which has many parallels to transformative theory. *Id.* at 288-317. Critics of transformative learning believe that Mezirow’s theory overly emphasizes rationality when transformative learning is, as Mezirow readily acknowledges, also intuitively, emotionally, and creatively driven. See, e.g., PATRICIA CRANTON, UNDERSTANDING AND PROMOTING TRANSFORMATIVE LEARNING: A GUIDE FOR EDUCATORS OF ADULTS xi, 4-21 (1994) (describing Mezirow’s theories and summarizing critiques).

135. Jack Mezirow, *Learning to Think Like an Adult: Core Concepts of Transformation Theory*, in LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS 3, 24 (Jack Mezirow et al. eds., 2000) [hereinafter Mezirow, *Learning to Think Like an Adult*].

136. Sharan B. Merriam, *Andragogy and Self-Directed Learning: Pillars of Adult Learning Theory*, in THE NEW UPDATE ON ADULT LEARNING THEORY, *supra* note 133, at 3, 9.

137. Sharan B. Merriam, *The Role of Cognitive Development in Mezirow’s Transformational Learning Theory*, 55 ADULT EDUC. Q. 60, 61 (2004).

138. MERRIAM & CAFFARELLA, *supra* note 131, at 319; see also MEZIOROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at xvi. Brazilian educator Paulo Friere’s theories informed Mezirow’s models. See PAULO FRIERE, EDUCATION FOR CRITICAL CONSCIOUSNESS (Continuum Publishing Corp. 1980) (1973); PAULO FRIERE, PEDAGOGY OF THE OPPRESSED (Myra Bergman Ramos trans., 1970).

139. MEZIOROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at 198.

140. Jack Mezirow, *Contemporary Paradigms of Learning*, 46 ADULT EDUC. Q. 158,

He divides adult learning into two categories: meaning schemes and meaning perspectives.<sup>141</sup>

Meaning schemes consist of “specific beliefs, feelings, attitudes, and value judgments.”<sup>142</sup> Adults frequently transform their meaning schemes by making relatively minor corrections of fact or interpretation rather than extensive self-reflection.<sup>143</sup> Meaning perspectives, on the other hand, are “broad, generalized, orienting predispositions.”<sup>144</sup>

Transformation of meaning perspectives requires intense examination of “our sense of self” and “critical reflection upon the distorted premises sustaining our structure of expectation.”<sup>145</sup> Meaning perspective transformation further entails “becoming critically aware of how and why our presuppositions have come to constrain the way we perceive, understand and feel about our world; of reformulating these assumptions to permit a more inclusive, discriminating, permeable and integrative perspective; and of making decisions or otherwise acting upon these new understandings.”<sup>146</sup>

Because transformative learning produces a “dramatic, fundamental change in the way we see ourselves and the world in which we live,”<sup>147</sup> resistance is not uncommon. Many people “are richly enmeshed in a fabric of relationships” with friends, relatives, co-workers, and others who oppose change.<sup>148</sup> Change necessitates complex renegotiation of those relationships and poses other significant challenges that make maintenance of the status quo a much more attractive option.<sup>149</sup> In addition, transformative learning demands both an emotional journey and a cognitive one.<sup>150</sup>

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162 (1996) [hereinafter Mezirow, *Contemporary Paradigms*].

141. *Id.* at 163.

142. *Id.*

143. See MEZIRROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at 167.

144. Mezirow, *Contemporary Paradigms*, *supra* note 140, at 163.

145. MEZIRROW, TRANSFORMATIVE DIMENSION, *supra* note 128, at 167.

146. Jack Mezirow, *How Critical Reflection Triggers Transformative Learning*, in FOSTERING CRITICAL REFLECTION IN ADULTHOOD: A GUIDE TO TRANSFORMATIVE AND EMANCIPATORY LEARNING 1, 14 (Alan B. Knox ed., 1990) [hereinafter Mezirow, *How Critical Reflection Triggers*].

147. MERRIAM & CAFFARELLA, *supra* note 131, at 318. See generally Jack Mezirow, *Transformative Learning: Theory to Practice*, 74 NEW DIRECTIONS FOR ADULT & CONTINUING EDUC. 5 (1997).

148. L.A. Daloz, *The Story of Gladys Who Refused to Grow: A Morality Tale for Mentors*, 11 LIFELONG LEARNING: AN OMNIBUS OF PRAC. & RES. 4, 7 (1988).

149. *Id.*

150. See Edward W. Taylor, *Analyzing Research on Transformative Learning Theory*, in LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS, *supra* note 135, at 290-92; see also Valerie Grabove, *The Many Facets of Transformative Learning Theory and Practice*, in TRANSFORMATIVE LEARNING IN

With so many factors favoring stagnation, what motivates people to exchange comfortable, long-held beliefs for new and perhaps daring ones? Mezirow posits that the transformative process is usually inspired by “a disorienting dilemma,” like the loss of employment, death of a loved one or other major event that the individual cannot fully process using past beliefs, assumptions or coping strategies.<sup>151</sup> However, not all transformative learning starts with a major upheaval. Professor M. Carolyn Clark, for example, found that perspective transformation may also be instigated by an “integrating circumstance.”<sup>152</sup> As she explains:

In contrast to the abrupt and dramatic appearance of the disorienting dilemma, the integrating circumstance occurs after and seems to be the culmination of an earlier stage of exploration and searching . . . . This is an indefinite period in which the person consciously or unconsciously searches for something which is missing in their life; when they find this ‘missing piece,’ the transformational learning process is catalyzed.<sup>153</sup>

Transformative learning can also be sparked simply by realizing that new information is inconsistent previously held beliefs, or by a lengthy accumulation of knowledge rather than a single revelation or event.<sup>154</sup> The introspection that triggers transformative learning may also be activated “by becoming aware that we are making a premature value judgment or are being inconsistent in acting out our values.”<sup>155</sup>

Once motivated to re-examine extant beliefs and the assumptions on which they are based, transformative learners do not always follow the same path.<sup>156</sup> Mezirow believes, however, that the triggering event is commonly followed by phases of self-examination (which may invoke negative emotions such as shame and guilt), critical introspection of beliefs on which the individual has previously relied (i.e. critical self reflection of assumptions, discussed further below), recognition that other people have experienced this type of

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ACTION: INSIGHTS FROM PRACTICE 89, 95 (Patricia Cranton ed., 1997) (noting in an introduction to an article in a symposium edition on transformative learning that “[t]he transformative learner moves in and out of the cognitive and the intuitive, of the rational and the imaginative, of the subjective and the objective, of the personal and the social”).

151. See MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at 168.

152. MERRIAM & CAFFARELLA, *supra* note 131, at 321 (discussing various empirical studies that have discovered triggering factors in the transformative learning process).

153. *Id.*

154. See Baumgartner, *supra* note 133, at 17-19.

155. Jack Mezirow, *On Critical Reflection*, 48 ADULT EDUC. Q. 185, 195 (1998) [hereinafter Mezirow, *On Critical Reflection*].

156. See Jack Mezirow, *Transformation Theory of Adult Learning*, in IN DEFENSE OF THE LIFEWORLD: CRITICAL PERSPECTIVES ON ADULT LEARNING 39, 50 (Michael R. Welton ed., 1995) [hereinafter Mezirow, *Transformation Theory of Adult Learning*].

sometimes-painful introspection, and finally, exploration of “options for forming new roles, relationships, or actions, which lead to formulating a plan of action.”<sup>157</sup>

Developing an action plan, in turn, requires several additional steps such as “acquiring knowledge and skills, trying out new roles, renegotiating relationships and negotiating new relationships, and building competence and self-confidence.”<sup>158</sup> Reintegration of the self with a transformed perspective into existing relationships and life circumstances is the final—and perhaps most difficult<sup>159</sup>—stage of transformative learning.<sup>160</sup>

## *2. Discourse and Critical Self Reflection of Assumptions*

Acquiring new knowledge and engaging in critical self-reflection of assumptions (“CSRA”) regarding existing and perhaps outdated meaning schemes and perspectives are key stages of transformative learning. Both require conversations with people knowledgeable about the subject. Using insights provided by German philosopher Jurgen Habermas, Mezirow uses the term “discourse” to describe the process of gathering and assessing information about a situation or issue.<sup>161</sup>

Discourse, Mezirow explains, is “dialogue devoted to... critically examining the widest possible range of evidence and arguments... to find understanding and agreement on the justification of beliefs.”<sup>162</sup> “Discourse involves an effort to set aside bias, prejudice, and personal concerns and to do our best to be open and objective in presenting and assessing reasons and reviewing the evidence.”<sup>163</sup> It may also require entertaining viewpoints “that we initially find discordant, distasteful, and threatening but later come to recognize as indispensable to dealing with our experience.”<sup>164</sup> Transformative “[d]iscourse can occur in one-to-one relationships, in groups, and in

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157. MERRIAM & CAFFARELLA, *supra* note 131, at 321 (emphasis omitted); see also Jack Mezirow, *Transformation Theory Out of Context*, 48 ADULT EDUC. Q. 60, 60 (1997).

158. MERRIAM & CAFFARELLA, *supra* note 131, at 321 (citing MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128).

159. See ERICH FROMM, *ESCAPE FROM FREEDOM* 21-23 (1941) (suggesting that humans tend to submit to authoritarian and majoritarian standards to avoid disruption of personal relationships that could cause loss of “meaning and direction” in their lives).

160. See MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at 185.

161. See Mezirow, *On Critical Reflection*, *supra* note 155, at 196

162. *Id.*

163. Mezirow, *Transformation Theory of Adult Learning*, *supra* note 156, at 53.

164. MEZIROW, TRANSFORMATIVE DIMENSIONS, *supra* note 128, at 185.

formal educational settings.”<sup>165</sup>

CSRA is another primary key to transformation of meaning perspectives that are grounded in social, political, spiritual, scientific or other life experiences.<sup>166</sup> CSRA plays a particularly poignant role when values and morals are re-evaluated.<sup>167</sup> According to Mezirow, CSRA offers “the emancipatory dimensions of adult learning, the function of thought and language that frees the learner from frames of reference, paradigms, or cultural canon (frames of reference held in common) that limit or distort communication and understanding.”<sup>168</sup> CSRA requires both objective<sup>169</sup> and subjective<sup>170</sup> re-framing of issues, and ultimately, of beliefs. In the objective reframing realm, the learner must critically examine whether persons contributing to the discourse are telling the truth or disingenuously “echoing some party line.”<sup>171</sup> “[T]he truth or justification of taken-for-granted assumptions” held or advocated by others must be fully evaluated.<sup>172</sup>

In the subjective reframing phase, the learner must perform a “critical analysis of the psychological or cultural assumptions that are the specific reasons for one’s conceptual and psychological limitations, the constitutive processes or conditions of formation of one’s experience and beliefs.”<sup>173</sup> This step may demand critical examination of the learner’s assumptions reflected in her own narrative of “lived experience[s],”<sup>174</sup> of the assumptions grounded in the individual’s “educational, linguistic, political, religious,...or other taken-for-granted cultural systems;”<sup>175</sup> of the “assumptions that are embedded in the history and culture of a workplace, and how they

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165. MERRIAM & CAFFARELLA, *supra* note 131, at 322.

166. See Mezirow, *On Critical Reflection*, *supra* note 155, at 186. In this respect, CSRA closely parallels philosopher Michel Foucault’s definition of “criticism” that ultimately results in “making facile gestures difficult.” See MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984*, 155 (Lawrence D. Kritzman ed., Alan Sheridan et al. trans., 1988) (describing criticism as “a matter of flushing out that thought and trying to change it: to show that things are not as self-evident as one believed, to see that what is accepted as self-evident will no longer be accepted as such”).

167. See Mezirow, *On Critical Reflection*, *supra* note 155, at 188.

168. *Id.* at 191-92.

169. See *id.* at 192.

170. See *id.* at 193-96.

171. *Id.* at 188.

172. *Id.* at 192. Truth seeking occurs naturally, “as there is some longing for the truth in every human being.” FROMM, *supra* note 159, at 249.

173. Mezirow, *On Critical Reflection*, *supra* note 155, at 193.

174. *Id.*

175. *Id.*

have impacted on one's own thought[s] and action[s];"<sup>176</sup> of assumptions that have provided "the norms governing one's ethical decision-making;"<sup>177</sup> and "of assumptions governing the way one feels and is disposed to act upon his or her feelings."<sup>178</sup>

Succinctly stated, the subjective aspects of CSRA implicate examination of "the causes (biographical, historical, cultural), the nature (including moral and ethical dimensions), and consequences (individual and interpersonal)" of the "frames of reference"<sup>179</sup> in which a person's meaning schemes and meaning perspectives are grounded. Transformation on this level requires a commitment to re-examine "specific assumptions about oneself and others until the very structure of assumptions becomes transformed."<sup>180</sup>

### 3. Transformative Opportunities: Action or Inertia

Although humans are often reluctant to engage in reflection that is painful, exhaustive and perhaps contrary to existing power relationships,<sup>181</sup> Mezirow believes that adults are open to perspective transformation because it allows them "to better understand the meaning of their experience,"<sup>182</sup> and because "[n]o need is more fundamentally human than our need to understand the meaning of our experience."<sup>183</sup> The ultimate test of transformative learning, however, is whether the learner acts upon the new scheme or perspective. Action can vary from making a relatively routine personal decision to engaging in radical social or political action.<sup>184</sup> Individual change spurs social change when "[p]ersonal transformation leads to alliances with others of like mind to work toward effecting necessary changes in relationships, organizations and systems."<sup>185</sup>

As Mezirow acknowledges, not all opportunities for transformative

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176. *Id.*

177. *Id.* at 194.

178. *Id.*

179. *Id.* at 195.

180. Jack Mezirow, *A Critical Theory of Adult Learning and Education*, 32 ADULT EDUC. 3, 8 (1981) [hereinafter Mezirow, *A Critical Theory*].

181. See Mezirow, *Learning to Think Like an Adult*, *supra* note 135, at 28.

182. Mezirow, *How Critical Reflection Triggers*, *supra* note 146, at 14.

183. *Id.* at 11.

184. See MERRIAM & CAFFARELLA, *supra* note 131, at 323 (explaining that the third stage of Mezirow's transformational learning process is for the learner to take action).

185. Jack Mezirow, *Transformation Theory: Critique and Confusion*, 42 ADULT EDUC. Q. 250, 252 (1992); see also MERRIAM & CAFFARELLA, *supra* note 131, at 324 (referencing Paulo Freire's argument that "personal empowerment and social transformation are intertwined and inseparable processes").

learning result in change. Individuals must decide to move past the triggering event and through the discourse participation and CSRA phases, and a breakdown or a suspension of growth can occur before change is actualized. In addition, because transformative learning is based on the learner's personal exposure and experience,<sup>186</sup> the decision to learn and change must be internally motivated.<sup>187</sup> Besides a willingness to change, those who attempt transformative learning must have sufficient cognitive skills to allow for "active construction [and deconstruction] of knowledge."<sup>188</sup>

### III. THE INTERSECTION OF COMPRESSION AND TRANSFORMATION

The fatal flaws of behavior-identity compression and humans' willingness to seek enlightenment through CSRA and transformative learning explain why sexual minorities have managed to record impressive social and political victories despite the obstacles previously described.<sup>189</sup> And yet, many individuals maintain negative meaning schemes and meaning perspectives about sexual minorities due to the persistent pressure that behavior-identity compression exerts on society, especially within conservative circles.

Current evidence strongly suggests, however, that recent developments within Christianity and science, paired with the increased visibility of sexual minorities, will continue to provide transformative sparks that inspire CSRA directed at the many false assumptions underlying behavior-identity compression. While the function that heightened visibility of sexual minorities plays in transformative learning is somewhat obvious, the roles of Christianity and science in promoting CSRA are more complicated.

Christianity and science provide appropriate lenses for exploring society's transformative learning about sexual minorities for three reasons. First, both disciplines significantly influence contemporary U.S. culture and law<sup>190</sup> and both disciplines have produced leaders whose opinions are influential in the ongoing debates about sexual minorities.<sup>191</sup> Second, the relationship between science and religion

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186. See Mezirow, *Transformation Theory of Adult Learning*, *supra* note 156, at 58.

187. See MACKERACHER, *supra* note 126, at 7, 134 (emphasizing that learning is "fuelled by intrapersonal energy rather than out of external pressure").

188. Merriam, *supra* note 137, at 63 (citing Mezirow, *On Critical Reflection*, *supra* note 155).

189. See *supra* Part II.

190. See *infra* Part III.B.1; *infra* Part III.C.1. See generally STEVEN GOLDBERG, *CULTURE CLASH: LAW AND SCIENCE IN AMERICA* (1994).

191. See *infra* Part III B.2; *infra* Part III C.2. Compare CATHOLIC MEDICAL ASSOCIATION, *HOMOSEXUALITY AND HOPE: STATEMENT OF THE CATHOLIC MEDICAL*



is intermittently synergetic and antagonistic.<sup>192</sup> It is synergetic because religion has often “provided presupposition, sanction, even motivation for science,” while also “regulat[ing] discussions of method” and even performing “a selective role in the evaluation of rival [scientific] theories.”<sup>193</sup> It is antagonistic because Christianity’s faith-based understanding of the universe clashes with science’s demand for empirical proof, resulting in ongoing public conflicts that inform popular opinion on contentious issues.<sup>194</sup>

Third, the views of science and Christianity on sexual minorities are inextricably intertwined. The field of psychology was born in the late nineteenth century, a time when “Christian morals strongly influenced definitions of sexuality, family, and social order.”<sup>195</sup> The scientific classification of homosexuality as a mental disease, for example, was grounded in Christian ethics rather than solid empirical data.<sup>196</sup> The specific roles that increased visibility, Christianity, and science are playing in transformative learning about sexual minorities are further explained in this section.

#### *A. Visibility and Enhanced Public Perception*

I’ve heard them whisper, ‘We understand you’ve got a homosexual here—can we see her?’<sup>197</sup>

Increased visibility of sexual minorities is playing a major role in triggering CSRA and transforming public perception of sexual

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ASSOCIATION (2000), available at <http://www.cathmed.org/publications/homosexuality.html> (setting forth assertions by Catholic medical professionals that homosexuality is an illness that can be cured), with Randy Georgemiller & Michael R. Stevenson, “*Homosexuality and Hope*” *Revisited*, DIGNITYUSA J., Summer 2003, at 11, 11-12, available at <http://www.apa.org/divisions/div44/HomosexualityandHope.pdf> (arguing that credible scientific data rejects the Catholic physicians’ position).

192. See GOLDBERG, *supra* note 190, at 176-77 (arguing that religious perspectives should be given more weight than scientific data when values are involved).

193. JOHN HEDLEY BROOKE, *SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES* 33 (1991).

194. See *generally* WHEN SCIENCE & CHRISTIANITY MEET (David C. Lindberg & Ronald L. Numbers eds., 2003) (explaining the historic interaction between Christianity and science).

195. CHUCK STEWART, *CONTEMPORARY LEGAL ISSUES: HOMOSEXUALITY AND THE LAW: A DICTIONARY* 230 (2001).

196. See *id.* See *generally* DAVID L. FAIGMAN, *LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW* 7-9 (1999) (discussing how “medieval theologians [] claim[ed] the scientific mantle” and greatly influenced the development of science as a discipline).

197. TOBIN & WICKER, *supra* note 76, at 54 (quoting Phyllis Lyon, co-founder of the early lesbian rights group Daughters of Bilitis, regarding her experience in the 1960s).

minorities.<sup>198</sup> In 2000, for example, almost three-quarters of respondents to a nationwide survey said they know a gay or lesbian person, and more than sixty percent of respondents said they have a gay friend or acquaintance.<sup>199</sup> In contrast, less than one-quarter of respondents reported having a gay friend or acquaintance in 1983<sup>200</sup> and one-ninth in 1969.<sup>201</sup> This heightened familiarity results from sexual minorities coming out—and staying out—at an earlier age than previous generations.<sup>202</sup> These developments are critical to transformative learning, as studies have repeatedly shown that personal relationships play a major role in terminating “blind acceptance of stereotypes”<sup>203</sup> about sexual minorities.<sup>204</sup>

Reflecting on the 1990s, for example, Professor Nancy D. Polikoff

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198. Visibility of bisexual persons remains challenging because many appear to conform to heterosexual norms. See generally *BI ANY OTHER NAME*, *supra* note 79, at 125-213.

199. See *INSIDE-OUT*, *supra* note 55, at 5, chart 10 (reporting that seventy three percent of respondents to a 2000 nationwide survey “know someone who is gay;” that sixty two percent “have a friend or acquaintance who is gay, lesbian or bisexual;” that thirty-two percent say they “work with someone who is gay,” up from twenty percent in 1992; and that twenty-five percent of respondents said they “have a family member who is gay,” up from nine percent in 1992).

200. See *id.*

201. See *Changing Morality: The Two Americas – A Time-Louis Harris Poll*, *TIME*, June 6, 1969, at 26 [hereinafter *Changing Morality*].

202. See generally Brent Hartinger, *Gay Teen Revolution*, *ADVOCATE*, June 7, 2005, at 11; Etelka Lehoczy, *Young, Gay, and OK*, *ADVOCATE*, Feb. 1, 2005, at 25.

203. Annie L. Cotten-Huston & Bradley M. Waite, *Anti-Homosexual Attitudes in College Students: Predictors and Classroom Interventions*, 38 *J. HOMOSEXUALITY* 117, 128 (2000). Sexual minority youth are also more visible than their predecessors, perhaps leading to greater tolerance among younger people. See John Caldwell, *Gay Straight Revolution: An Explosion of Gay-Supportive Clubs at High Schools Across the Country is Helping a Generation Become Crusaders for Equality*, *ADVOCATE*, June 21, 2005, [http://www.findarticles.com/p/articles/mi\\_m1589/is\\_2005\\_June\\_21/ai\\_n15378737/print](http://www.findarticles.com/p/articles/mi_m1589/is_2005_June_21/ai_n15378737/print) (reporting that over three-thousand gay-straight alliances “exist nationwide, with chapters in all [fifty] states” and that new chapters are born almost daily). Conservatives are unhappy with this development. See Michael Janofsky, *Gay Rights Battlefields Spread to Public Schools*, *N.Y. TIMES*, June 9, 2005, at A18 (explaining efforts to eliminate education about sexual minorities).

204. See Cotten-Huston & Waite, *supra* note 203, at 127 (reporting that “personal acquaintance with a gay man, lesbian, or bisexual person” provided a strong predictor of positive attitudes toward sexual minorities); see also *INSIDE-OUT*, *supra* note 55, at 6 (concluding from nationwide survey results that people “who do not have lesbian and gay co-workers, friends or family members” are among those “least likely to have accepting attitudes towards lesbians, gays and bisexuals”). But see Angela Simon, *The Relationship Between Stereotypes of and Attitudes Toward Lesbians and Gays*, in *STIGMA AND SEXUAL ORIENTATION: UNDERSTANDING PREJUDICE AGAINST LESBIANS, GAY MEN, AND BISEXUALS* 62, 74-75 (Gregory M. Herek ed., 1998) (noting that some social scientists who study the “contact hypothesis” question whether favorable contact with a single member of a minority group “facilitate[s] positive attitude change that generalizes to the larger out-group”). The transformative power of personal relationships with sexual minorities, however, cannot be denied. See Bruce Shenitz, *The Grande Dame of Gay Liberation: Evelyn Hooker’s Friendship with a UCLA Student Spurred Her to Studies that Changed the Way Psychiatrists View Homosexuality*, *L.A. TIMES*, June 10, 1990, (Magazine), at 20.

made the following observation about the impact of increased visibility of families headed by sexual minorities:

The number of planned lesbian and gay families has skyrocketed, bringing unprecedented visibility in the media, in schools, in churches and synagogues, and in the courts . . . . Dozens of articles appear in daily papers each year, in such places as Dayton, Ohio, Sarasota, Florida, and Greensboro, North Carolina, as well as all major cities, describing local lesbian and gay families and their children. News coverage this decade has included the relatively recent phenomenon of gay fathers raising biologically related children born to a surrogate mother.<sup>205</sup>

This heightened and mostly positive coverage of families has led to “an increased number of heterosexual allies” who “influence mainstream organizations.”<sup>206</sup> The role of allies is critical, as “[t]he fullest burden for achieving change falls on progressive and moderate straights and their ability to convince fair-minded conservatives to accept gay people.”<sup>207</sup>

Openness about nontraditional family structure—regardless of whether the children were born of a prior heterosexual relationship or from a same-sex couple’s decision to have children—also allows children from traditional families to befriend the children of sexual minorities, “thereby learning about gay and lesbian families in ways that break down myths, stereotypes and fear.”<sup>208</sup> The existence of households headed by same-sex partners in virtually every county in the United States provides extensive opportunity for such interactions to occur.<sup>209</sup>

The relationship between visibility and transformative learning is confirmed by the Massachusetts experience.<sup>210</sup> More than 6,100 same-sex couples have married<sup>211</sup> since Massachusetts became the

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205. Polikoff, *Raising Children*, *supra* note 21, at 326; see also Larry Muhammad, *Father’s Day for Two Dads: Gay Men’s Children Say They Make Good Parents*, *COURIER-J.*, June 19, 2005, at 01E.

206. Polikoff, *Raising Children*, *supra* note 21, at 326.

207. Gene Huff, *Debating Homosexuality*, *CHRISTIAN CENTURY*, Mar. 8, 2000, at 280, 280 (reviewing *HOMOSEXUALITY AND CHRISTIAN FAITH: QUESTIONS OF CONSCIENCE FOR THE CHURCHES* (Walter Wink ed., 1999) [hereinafter *HOMOSEXUALITY AND CHRISTIAN FAITH*]).

208. Polikoff *Raising Children*, *supra* note 21, at 326.

209. See Gary J. Gates and Jason Ost, *Getting Us Where We Live*, *GAY & LESBIAN REV.*, Sept.-Oct. 2004, at 19, 19 (reporting on data from the 2000 U.S. Census that found “same-sex unmarried partners were present in 99.3 percent of all counties in the United States”).

210. The relationship is also confirmed by the experiences in the few countries where same-sex marriages are legal. See, e.g., Michael Valpy, *Dutch, Belgians take Gay Marriage in Stride Though Protected by Law at Home, Same-Sex Spouses Face Hurdles Abroad*, *GLOBE & MAIL*, June 4, 2005, at A16.

211. See Williams Lee Adams, *Gay to Wed*, *NEWSWEEK*, May 23, 2005, (Periscope),

first state to legalize same-sex unions in May 2004. Public support for same-sex marriage has increased as same-sex couples have shared their weddings and opened their lives to co-workers, family members and neighbors.<sup>212</sup> In fact, eighty-four percent of Massachusetts voters believe that gay marriage either “had a positive or no impact on the quality of life” in the state.<sup>213</sup> In short, predictions of havoc following legalization of same-sex marriage have “been trumped by boring, everyday reality” as “[c]ouples got married and went on with their lives” in Massachusetts.<sup>214</sup>

Once news events such as same-sex marriage trigger individuals’ willingness to engage in transformative learning, discourse about sexual minorities is widely available.<sup>215</sup> Indeed, it is difficult to pick up a daily newspaper or a weekly news magazine without at least one story about same-sex marriage, civil unions or domestic partnerships, scientific discoveries related to sexual orientation and identity, or other social and political issues centering on sexual minorities.<sup>216</sup>

Discourse is further informed by the “explosion” of sexual minorities now featured in pop culture.<sup>217</sup> The nation’s ever-present

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at 12; see also Press Release, Statement from Sue Hyde, Task Force Mass. Field Organizer, Dir. of Creating Change Conference, Nat’l Gay and Lesbian Task Force, *The Math Facts on the Marriage Equality Ground* (May 17, 2005), available at <http://www.thetaskforce.org/media/release.cfm?releaseID=826> [hereinafter Statement from Sue Hyde].

212. See Adams, *supra* note 211, at 12 (stating that public support in Massachusetts had increased by April 2005 to fifty-six percent compared with thirty-five percent a year earlier); Statement from Sue Hyde, *supra* note 211 (reporting on a state-wide Massachusetts poll showing significant support for same-sex marriage and for the state supreme court decision allowing same-sex marriage); see also Scott S. Greenberger, *One Year Later, Nation Divided on Gay Marriage: Split Seen by Region, Age* [sic], *Globe Poll Finds*, B. GLOBE, May 15, 2005, at A1 (reporting that state-wide public support for same-sex marriage had increased to fifty-six percent in the year following its legalization in Massachusetts).

213. Adams, *supra* note 211.

214. Adrian Walker, *Calm After the Storm*, B. GLOBE, May 16, 2005, at B1. Gay and lesbian individuals and families are becoming more visible in conservative states as well. See, e.g., Chad Graham, *Gay in the Red States*, ADVOCATE, Feb. 1, 2005, [http://www.findarticles.com/p/articles/mi\\_m1589/is\\_2005\\_Feb\\_15/ai\\_n9538112/print](http://www.findarticles.com/p/articles/mi_m1589/is_2005_Feb_15/ai_n9538112/print).

215. See, e.g., Keith W. Swain, *Marriage in a Loving Family*, DENV. POST, Feb. 23, 2005, at B-07 (describing an eighty-year old matriarch’s support for her grandson’s same-sex marriage); see also Herb Brock, *Late Partner Inspires Local Gay Woman’s “Mission,”* DANVILLE ADVOC.-MESSENGER, Feb. 6, 2005, at 1 (describing a closeted thirty-eight year partnership of two women and the surviving partner’s efforts to tell their story).

216. See SUZANNA DANUTA WALTERS, *ALL THE RAGE: THE STORY OF GAY VISIBILITY IN AMERICA* 3 (2001).

217. See *id.* at 3-5; see also Susan Frelich Appleton, *Contesting Gender in Popular Culture and Family Law: Middlesex and Other Transgender Tales*, 80 INDIANA L. J. 391 (2005) (discussing increased attention to “transsexuals, intersexed individuals, and others of uncertain gender classification” in contemporary books, movies and television programs, along with the potential impact on legal developments affecting these sexual minorities).

television screens, for instance, feature shows focusing on the lives of gay and lesbian individuals (e.g. *Will & Grace*, *Queer as Folk*, *Queer Eye for the Straight Guy* and *The L Word*) and programs that regularly feature gay or lesbian characters (e.g. *Sisters*, *NYPD Blue*, *ER*, *Six Feet Under*, *Buffy the Vampire Slayer*, *The Great Race* and *The Real World*).<sup>218</sup> Numerous other television series have offered “the almost obligatory” episode addressing the collision of heteronormativity with the lives of sexual minorities.<sup>219</sup> Documentaries, docudramas and movies about sexual minorities also abound,<sup>220</sup> as do print and broadcast advertisements that assimilate sexual minorities.<sup>221</sup>

Efforts to censor positive messages about sexual minorities continue,<sup>222</sup> and not all portrayals of sexual minorities are accurate or

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218. See Geraldine Fabrikant, *A Foray into Gay and Lesbian Networks: Two New Cable Ventures Seek to Tap the Market*, N.Y. TIMES, Apr. 11, 2005, at C1 (reporting that efforts to launch cable channels “aimed at mainstream gay Americans” are also underway); see also WALTERS, *supra* note 216, at 59-80 (discussing lesbian and gay visibility on television from the early 1970s through 2001).

219. See WALTERS, *supra* note 216, at 91; see also *Not Just Jack*, ADVOCATE, June 21, 2005, [http://www.findarticles.com/p/articles/mi\\_m1589/is2005June21/ain14814157/print](http://www.findarticles.com/p/articles/mi_m1589/is2005June21/ain14814157/print) (describing a University of Minnesota communication researcher who is exploring the “parasocial contact hypothesis” and believes television “exposure to gay characters . . . ‘can reduce prejudice in a manner similar to direct contact with people’”).

220. See generally WALTERS, *supra* note 216, at 75-80, 103, 131-48; see also Adam V. Vary & Dennis Hensley, *Here Comes the New New Queer Cinema*, ADVOCATE, Apr. 26, 2005, at 40. Movies released in late 2005 such as *Brokeback Mountain*, a fictional story about the intimate relationship between two cowboys, and *TransAmerica*, highlighting the complex issues faced by a male-to-female transsexual person, have received critical acclaim and extensive media coverage. See, e.g., Vary, *supra* note 125 (discussing the critical and financial success of *Brokeback Mountain*, the movie’s potential impact on the public’s perception of sexual minorities in this country, and the incentive its success may provide for production of additional gay-themed films); John Walsh, *Gay Cinema The Story So Far*, THE INDEP., Dec. 14, 2005, at 14 (reporting on *Brokeback Mountain*’s nomination for seven Golden Globe awards); Joe Williams, *The Many Faces of Gay Hollywood from “Capote” and “Transamerica” to “Brokeback Mountain” and “Breakfast on Pluto,” Gay Characters Evolve Beyond Sex and Illness*, ST. LOUIS POST-DISPATCH, Dec. 18, 2005 at F3.

221. See Howard Buford, *The Gay Market Goes Mainstream*, GAY & LESBIAN REV., Jan.-Feb. 2005, at 22 (commenting on the trend toward “more complete, less divisive portrayals of GLBT people in advertising” and predicting that it will help diffuse negative stereotypes).

222. See Julie Salamon, *Culture Wars Pull Buster into the Fray*, N.Y. TIMES, Jan. 27, 2005, at E1 (explaining the decision by Public Broadcasting System (PBS) not to allow airing of the episode of the children’s show *Postcards from Buster* during which Buster visited the children of lesbian parents); see also David D. Kirkpatrick, *Conservatives Taking Aim at Soft Target: A Cartoon Sponge*, N.Y. TIMES, Jan. 20, 2005, at A16 (commenting on Focus on the Family’s James Dobson’s condemnation of cartoon character SpongeBob SquarePants for advocating tolerance and acceptance); Shirley Ragsdale, *SpongeBob Debate Stirs Media Frenzy*, DES MOINES REG., Feb. 5, 2005, at 1E (offering comments by the newspaper’s religion editor that Dobson’s characterization of SpongeBob SquarePants as a gay figure will likely encourage “more fear and loathing of people who aren’t just exactly like the current majority in power”); Frank Rich, *The Plot Against Sex in America*, N.Y. TIMES, DEC.

positive. To the contrary, some exposures seem to affirm negative stereotypes rather than dispel them.<sup>223</sup> As one expert on popular culture notes, “[g]ay life and identity, defined so much by problems of invisibility, subliminal coding, double entendres and double lives, has now taken on the dubious distinction of public spectacle.”<sup>224</sup>

Spectacle or not, fictionalized and factual depictions of sexual minorities ubiquitously broadcast by contemporary media mean that heterosexual society can no longer deny the existence of this segment of the population, or continue to proclaim that the lives of sexual minorities are universally and radically different than their heterosexual neighbors. Positive shifts in public opinion about sexual minorities over the past several decades<sup>225</sup> indicate that, despite significant opposition,<sup>226</sup> some truths about sexual minorities are being communicated and received. These truths inspire CSRA that reveals the many flaws inherent in behavior-identity compression<sup>227</sup> and ultimately leads to transformative revision of meaning schemes and perspectives about sexual minorities. Continued transformation inspired by heightened visibility will play a major role in the demise of social and legal discrimination against sexual minorities.

### *B. Onward Christian Soldiers*

You can safely assume you’ve created God in your own image when it turns out that he hates all the same people you do.<sup>228</sup>

Strong religious convictions correlate with heightened prejudice

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12, 2004, at § 2, at 1 (reporting on the level of conservatives’ protests aimed at a recently released movie about sex researcher Alfred Kinsey).

223. See Monica Trasandes, *Are We Visible Yet?*, ADVOCATE, Feb. 1, 2005, [http://www.findarticles.com/p/articles/mi\\_m1589/is\\_2005\\_Feb\\_1/ai\\_n9487806/print](http://www.findarticles.com/p/articles/mi_m1589/is_2005_Feb_1/ai_n9487806/print) (stating that “American TV fans are seeing a wider slice of lesbian life than ever before,” but questioning whether such portrayals are realistic or “just a disappointing rehash of stereotypes”); see also Simon, *supra* note 204, at 73 (concluding that negative stereotypes and prejudice are linked). The Gay and Lesbian Alliance Against Discrimination (“GLADD”) monitors movies, television shows, and other media and registers protests when sexual minorities are represented in stereotypical or harmful ways. See WALTERS, *supra* note 216, at xv, 96, 137.

224. WALTERS, *supra* note 216, at 9-10.

225. See *supra* Part II.A.3.

226. This progress has been made despite conservatives’ long-standing efforts to keep sexual minorities out of the public’s eye. See WALTERS, *supra* note 216, at 114-16 (describing the pressure placed on networks and sponsors by The Christian Coalition, Traditional Values Coalition, Family Research Council and other groups to discourage the production and broadcasting of programs about sexual minorities).

227. See *supra* Part III.A.

228. Connie Schultz, *Building Bridges Instead of Walls*, PLAIN DEALER (Cleveland), May 24, 2004, at D1 (quoting novelist Anne Lamott).

against sexual minorities in this country.<sup>229</sup> Nonetheless, media reports equating November 2004 election results with (1) a seismic shift in Christian influence and (2) unprecedented public agitation over “moral issues”<sup>230</sup> overstate both cases.<sup>231</sup> Christianity has *always* played a major role in the legal and political activities of this nation—especially regarding laws and policies that embody moral judgments<sup>232</sup>—and concerns about morality have been frequently voiced.<sup>233</sup>

Contemporary media fail to acknowledge that Christianity influenced the laws of this land from the time the Puritans first stepped on its eastern shore. Many Puritan colonists were devout Calvinists<sup>234</sup> who believed governments should be Christianized.

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229. See Cotten-Huston & Waite, *supra* note 203, at 128; Lee A. Kirkpatrick, *Fundamentalism, Christian Orthodoxy, and Intrinsic Religious Orientation as Predictors of Discriminatory Attitudes*, 32 J. FOR. SCI. STUDY RELIGION 256, 256 (1993).

230. See, e.g., Debra Rosenberg & Karen Breslau, *Winning the ‘Values’ Vote*, NEWSWEEK, Nov. 15, 2004, at 23; see also Todd S. Purdum, *The 2004 Elections: A Look Back—News Analysis: An Electoral Affirmation of Shared Values*, N.Y. TIMES, Nov. 4, 2004, at A1.

231. See Janet Hook, *Survey of Voters Maps Subtle Splits: A Study Finds that in Spite of GOP Gains, Republicans, Democrats and Independents Are Divided over Issues Depending on Their Type*, L.A. TIMES, May 11, 2005, at A16 (reporting on conclusions from the Pew Research Center’s analysis of extensive survey data that Republicans’ “leadership on national security issues” rather than domestic “morals” issue was greatest influence in 2004 election); Gregory B. Lewis, *Same-Sex Marriage and the 2004 Presidential Election*, PS: POL. SCI. & POL., Apr. 2005, at 195, 197, available at <http://www.apsanet.org/imgtest/PSApr05Lewis.pdf> (concluding from election survey data, “the war in Iraq, the economy, and terrorism all had larger impacts on vote choices” than did same-sex marriage). Perhaps the media was misled by the relatively quiet period of the anti-gay crusade that followed the reelection of Democratic president William Clinton; however, sexual minority advocates had remained keenly aware of the religious right’s strength and persistence. See generally John Gallagher, *Silent but Deadly: The Religious Right Hasn’t Disappeared: They’re Quietly Doing Their Nastiest Work Behind the Scenes*, ADVOCATE, Mar. 4, 1997, at 26.

232. For instance, “sodomy”—i.e., the crime that includes certain sexual acts in which homosexuals are assumed to engage—is derived from the Christian biblical story of Sodom and Gomorrah in which God allegedly destroyed two cities due to citizens’ homosexual behavior. Current objections in the United States to same-sex marriage are also deeply rooted in Christian tradition. See Josephine Mazzuca, *Gay Rights: U.S. More Conservative Than Britain, Canada*, GALLUP POLL TUESDAY BRIEFING, Oct. 12, 2004, (Values and Social Trends) (positing that the higher level of religiosity demonstrated by U.S. citizens “seems to be a key driver of sentiment on gay marriage and civil unions.”).

233. See, e.g., *What’s Happening to American Morality?*, U.S. NEWS & WORLD REPORT, Oct. 13, 1975, at 39 (explaining that a “moral crisis” exists in America and offering a cleric’s opinion that “[w]e must return to that ‘old-time religion’” to cure societal ills); see also *Changing Morality*, *supra* note 201, at 26 (reporting in 1969 that “Americans are more concerned than ever before about the problems of morals and ethics.”).

234. See ELIZABETH BREUILLY ET AL., RELIGIONS OF THE WORLD: THE ILLUSTRATED GUIDE TO ORIGINS, BELIEFS, TRADITIONS & FESTIVALS 50-51 (1997). The Puritan minority controlled England for a brief time during the dictatorial government of Oliver Cromwell. *Id.* When the English monarchy was restored in 1660, the Church of England was also resurrected. *Id.* The displaced Puritans (i.e. “Dissenters”) were

Calvinists “wished to remake society itself into the image of a religious community, with all people living stern, disciplined and saintly lives, with kings themselves doing the Lord’s work.”<sup>235</sup> Calvinists supported their views through literal and unforgiving application of scripture.<sup>236</sup> The early colonies generally embraced the Calvinists’ perspective and established an official Christian religion.<sup>237</sup>

A colony’s official religion had serious clout. While clergy and congregants of the sanctioned religion enjoyed full rights and privileges of citizenships, outliers were ostracized and prosecuted. In Virginia, for instance, laypersons and ministers were jailed for participating in unofficial liturgy or other religious activity.<sup>238</sup> Additional disadvantages befell dissenters from the colony’s official religion. One scholar explained the nonconformists’ plight in language that resonates in today’s disenfranchisement of sexual minorities:

An establishment of religion had an official creed or articles of faith, and its creed alone could be publicly taught in the schools or elsewhere. Its clergy alone had civil sanction to perform sacraments or allow them to be performed. Subscribers to the established faith enjoyed their civil rights, but the law handicapped dissenters, even if it tolerated their worship, by the imposition of civil disabilities. Dissenters were excluded from universities and disqualified for office, whether civil, religious, or military. Their religious institutions (churches, schools, orphanages) had no legal capacity to bring suits, hold or transmit property, receive or bequeath trust funds . . . . [S]ome governments . . . also imposed religious tests on officeholders to make certain that only believers in the gospel would be entrusted with an official capacity.<sup>239</sup>

The inequities worked by official state religions proved untenable.<sup>240</sup> After the American Revolution, the colonies transformed themselves into states with constitutions that prohibited establishment of an

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excluded from participation in the political process and forbidden from practicing their religion, a situation that inspired many of them to migrate to colonial America. *Id.*; R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 147-151 (3d ed. 1965).

235. PALMER & COLTON, *supra* note 234, at 75.

236. *See id.* at 76 (observing that “[i]n all things Calvin undertook to regulate his church by the Bible”).

237. *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT I (1986).

238. *See id.* at 3-4 (discussing the establishment of the Anglican Church as Virginia’s state Church and its curtailment of numerous civil liberties of those who adhered to other faiths).

239. *See id.* at 4-5.

240. *See generally* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 105-133 (1986).



official state religion, but still allowed intermingling of church and government.<sup>241</sup>

The Federal Constitution, forged in 1787, had no provisions respecting religion save for prohibiting a religious test as a prerequisite for holding federal office.<sup>242</sup> The Constitution's drafters believed that the federal government was not empowered "to enact laws that benefited one religion or church in particular or all of them equally and impartially."<sup>243</sup> The founding fathers did not intend the government to be areligious, however, as George Washington was not alone in his belief "that 'no true patriot' would strive to erode the political influence of religion."<sup>244</sup>

The First Amendment added constitutional text in 1791 that prohibited the governmental establishment of and interference with religion,<sup>245</sup> but neither its language nor its legislative history provide a clear path to interpretation.<sup>246</sup> In general, however, "[p]reventing the establishment of religion has never meant, either historically or in court, that religious perspectives cannot be expressed in public debates over morality."<sup>247</sup> Somewhat ironically, it may have been the attempted separation of church and state, however ambiguously set forth in the First Amendment, which produced "the quiet sway" of Christianity over this country.<sup>248</sup> As one scholar observed, "[b]ecause the domains of religion and government remain separated, religion

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241. See LEVY, *supra* note 237, at 27-78 (noting that the intermingling of religious and secular matters was demonstrated by continued collection of taxes to support clergy and religious institutions). See generally *id.* at 31-33, 38-45 (discussing the Massachusetts, New Hampshire and Connecticut religious tax systems).

242. See U.S. CONST. art.VI, cl. 3.

243. LEVY, *supra* note 237, at 66. For example, James Madison commented, "[t]here is not a shadow of right in the general government to intermeddle with religion." *Id.* at 100-01.

244. Patrick M. Garry, *The Myth of Separation: America's Historical Experience with Church and State*, 33 HOFSTRA L. REV. 475, 486 (2004) (quoting George Washington).

245. See U.S. CONST. amend. I (providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

246. LEVY, *supra* note 237, at 91-92 (indicating that the nonpreferentialists contend that the First Amendment's Establishment Clause prohibits the government from favoring one religion over another, but does not ban aid to religions on an equal basis). Chief Justice William H. Rehnquist is among the judges, scholars and politicians who embrace this view. *Id.* In contrast, separationists argue that the Establishment Clause is a wall that prohibits government support of all religious activities. *Id.* at 181-85.

247. See GOLDBERG, *supra* note 190, at 179.

248. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 294-95 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1966) (explaining that Alexis de Tocqueville made this observation when visiting the United States about fifty years after its independence). Tocqueville expressed "astonishment" that all of the people he met, lay and cleric alike, attributed the pervasive religious atmosphere in the country to the freedom generated by separation of church and state. *Id.*

in the United States, like religious liberty, thrives mightily.”<sup>249</sup>

In fact, from its founding to throughout the nineteenth century, “[m]any Americans understood themselves as having created a republic that corresponded to the theological insights of the Reformation.”<sup>250</sup> Legal equality of all citizens was firmly rooted in the Christian concept of equality of all people in God’s eyes, and clergy, politicians and the common man all believed that the country would survive and prosper only if populated by true followers of Christ.<sup>251</sup> “Manifest Destiny,” the political rhetoric that inspired wars against both native Americans and Mexicans, embodied a conviction that God had chosen the United States to rule over North America due to the righteousness of its people, just as God has once selected Abraham and the ancient Jews as his chosen people.<sup>252</sup>

Viewed through this historical lens, contemporary “culture wars” pitting conservative Christians against progressive members of society cannot be deemed of recent vintage.<sup>253</sup> In addition, with more than eighty percent of the current U.S. population claiming affiliation with a Christian religion,<sup>254</sup> it is unlikely that Christianity’s de facto appointment as arbiter of secular moral standards will be revoked anytime soon.<sup>255</sup> Christianity’s continuous influence on U.S. law and public morality related to sexual minorities is best documented by this country’s long-standing deference to the moral standards derived from the Christian Bible. Thus, a brief synopsis of Biblical influence

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249. LEVY, *supra* note 237, at 246.

250. PATRICK ALLITT, *RELIGION IN AMERICA SINCE 1945: A HISTORY* 6 (2003).

251. *See id.*

252. *See id.*

253. *See* SUSAN JACOBY, *FREETHINKERS: A HISTORY OF AMERICAN SECULARISM* 186-226 (2004) (contending that the culture wars commenced shortly after the Civil War due to the unprecedented numbers of immigrants, the additional work needed to truly emancipate slaves, the birth of the women’s movement, the efforts of labor to be recognized and respected in an expanding, industrialized economy and the shift in population from rural to urban environments). Jacoby observed that “[i]n the cultural and political debate over these issues, there was always a strong undercurrent of conflict over the proper role of religion and the limits of religious influence in civil society.” *Id.* at 187.

254. Jeffrey M. Jones, *Tracking Religious Affiliation, State by State*, GALLUP POLL NEWS SERVICE, June 22, 2004, available at <http://poll.gallup.com/content/default.aspx?CI=12091>; *see also* *Where We Stand on Faith*, NEWSWEEK, Sept. 5, 2005, at 48 (reporting that eighty-five percent of participants in a nationwide poll taken in August 2005, identified as Christian). Further, thirty-three percent classified themselves as Evangelical Protestant, twenty-five percent as Non-evangelical Protestant, twenty-two percent as Roman Catholic and five percent as “Other Christian.” *Id.*

255. *See generally* Suzanne B. Goldberg, *Morals-Based Justifications for Lawmaking: Before and After Lawrence v. Texas*, 88 MINN. L. REV. 1233, 1300-05 (2004) (providing insightful explication of the relationship between law and morality).

is provided here.

### *1. Biblical Influence on U. S. Law*

The Bible<sup>256</sup> has been particularly dominant in the formation and moral underpinnings of U.S. law. Theologian Peter Gomes describes this country's "historic intimacy" with the Christian Bible as follows:

Indeed, the first book printed in New England on the seventeenth-century press of Harvard College was the Bible. Our presidents are sworn into office on the Bible, and oaths in court are taken on them. In the culture wars we argue about the place of the Bible in our civic society, and politicians quote from the Bible in justification of their policy positions on moral questions. The ubiquity of the Bible in American public life has long been an object of comment on the part of observers of the American scene.<sup>257</sup>

Christian Biblical passages provided moral justification for centuries of slavery in this country,<sup>258</sup> with disagreements over the proper interpretations of scripture arguably culminating in the Civil War.<sup>259</sup> Biblical interpretations supplied the "moral" grounds for prohibition,<sup>260</sup> laws requiring racial segregation and the numerous state laws outlawing interracial marriages<sup>261</sup> that remained

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256. The Bible consists of sixty-six books authored by early Christians and ancient Hebrews and edited over many centuries into a single work. The Old Testament of the Christian Bible was primarily reconfigured from the Hebrew Bible, the Jewish holy book with origins predating the birth of Jesus by nearly a thousand years. See PETER J. GOMES, *THE GOOD BOOK: READING THE BIBLE WITH MIND AND HEART* 13, 16 (1996). See generally CHRISTOPHER DE HAMEL, *THE BOOK: A HISTORY OF THE BIBLE* (2001). The New Testament consists of scriptures selected from a vast body of writings, with the authorship of many texts remaining uncertain. A major debate remains, for example, as to whether the men to whom the major Gospels are attributed—Matthew, Mark, Luke and John—"were actual historical figures who knew Jesus," or were "merely invented names attached to collections of stories which were finally committed to writing only when the last living witnesses [to the life and death of Jesus] had died." *Id.* at 321.

257. See GOMES, *supra* note 256, at 53.

258. Biblical passages cited to support slavery include: "Slaves, be obedient to the men who are called your masters in this world, with deep respect and sincere loyalty, as you are obedient to Christ." *Ephesians* 6:5. Slavery was "one of the social givens" in the New Testament and Jesus did not denounce it. See GOMES, *supra* note 256, at 88. Baptists, Presbyterians, Methodists and other denominations "split into proslavery Southern branches and antislavery Northern ones before the Civil War" due to their differing interpretation of scripture. See ALLITT, *supra* note 250, at 7.

259. See GOMES, *supra* note 256, at 87-92. It has been argued, "[b]rothers went to war and shed blood in the most divisive form of human conflict, a civil war . . . in large measure on the authority of mutually exclusive readings of scripture." *Id.* at 97.

260. See U.S. CONST. AMEND. XVIII (repealed 1933) (forbidding "the manufacture, sale, or transportation of intoxicating liquors"). Working closely with Protestant ministers, the Women's Christian Temperance Union (W.C.T.U.) championed the amendment's passage. See GOMES, *supra* note 256, at 196, 212.

261. See ALLITT, *supra* note 250, at 52-53 (indicating that some Christians based their beliefs "that God himself created racial segregation" on two main arguments:

constitutional until 1967.<sup>262</sup> Both the name and the moral underpinnings of the crime of sodomy are attributable to the Biblical story of the destruction of Sodom and Gomorrah, which some Christians cite as proof of God's displeasure with homosexual conduct.<sup>263</sup> In addition, Biblical passages related to the creation of Adam and Eve and other Biblical passages are frequently cited by those who oppose same-sex marriage.<sup>264</sup>

## 2. Biblical Condemnation of Homosexuality

Conservative Christians' condemnation of sexual minorities emanates from a view of the Bible that rejects the possibility of CSRA and transformative learning and which animates behavior-identity compression.<sup>265</sup> In patterns that both reflect and reinforce behavior-identity compression, many Christians believe that sexual minorities are appropriately defined solely by their sexual behavior;<sup>266</sup> that sexual minorities can control their sexual desires, and, by doing so, determine their sexual orientation and overcome their tendency toward sin;<sup>267</sup> that sexual minorities are extremely promiscuous;<sup>268</sup> and that sexual minorities are a "menace" to society "and especially a threat to the values of the family."<sup>269</sup> Many Christians also believe

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(1) God's separation of Noah's white sons Shem and Japheth from their brother Ham, whom God made black and cursed after the great flood; and (2) racial purity laws for Jews in both the Old and New Testaments).

262. See *Loving v. Virginia*, 338 U.S. 1, 11-12 (1967). At the time *Loving* was argued, sixteen states had anti-miscegenation laws. *Id.* at 6.

263. See *infra* Part III.B.2 (discussing a gay-compassionate interpretation of the Bible); Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 497-99 (2002) (recounting the evolution of sodomy from a religious to a criminal offense).

264. See Larry Cata Backer, *Religion as the Language of Discourse of Same Sex Marriage*, 30 CAP. U. L. REV. 221, 234-37 (2002); Michael J. Perry, *Christians, the Bible, and Same-Sex Unions: An Argument for Political Self-Restraint*, 36 WAKE FOREST L. REV. 449, 453 (2001).

265. See *supra* Part III.A.

266. See JOHN J. MCNEILL, *THE CHURCH AND THE HOMOSEXUAL* 41 (4th ed. 1993).

267. See ALLITT, *supra* note 250, at 232 (reporting conservative religious views that homosexuality is "a horrible sin" and that "individuals who felt tempted to act on same-sex attraction ought to resist the temptation rather than succumb and then rationalize their action" by claiming their condition was natural); see also Editorial, *Walking in the Truth: Winning Arguments at Church Conventions is Not Enough Without Compassion for Homosexuals*, CHRISTIANITY TODAY 44, Sept. 4, 2000, at 46 (urging Christians to help homosexuals overcome their sinful tendencies and encourage homosexuals not to act on their sinful inclination); Josephine Mazzuca, *Origins of Homosexuality? Britons, Canadians Say "Nature,"* GALLUP POLL TUESDAY BRIEFING, Nov. 2, 2004, (Religion and Social Trends) (finding in a nationwide poll that only twenty-six percent of persons who "attend church weekly believe that homosexuality" is set at birth).

268. See MCNEILL *supra* note 266, at 111-13.

269. See *id.* at 197.

that sexual minorities have two paths to salvation and acceptance, in this world and the next: sexual abstinence<sup>270</sup> or conversion to heterosexuality.<sup>271</sup>

Christian condemnation of sexual minorities and refusal by fundamentalist Christians to engage in CRSA on the subject are largely predicated on a fundamentalist interpretation of the Bible. Conservative Christians frequently cite a handful of Biblical passages as proof that God condemns any sexuality except the heterosexual, binary model of Adam and Eve.<sup>272</sup> Labeled by progressive theologians as the “terrible texts,”<sup>273</sup> these passages include the story of God’s destruction of the city of Sodom for alleged homosexual depravity,<sup>274</sup> characterization of a man lying with another man as an “abomination” that justifies putting both men to death,<sup>275</sup> condemnation of “fornication,”<sup>276</sup> several passages attributed to Saint Paul that the gates to the kingdom of heaven are not open to homosexuals,<sup>277</sup> language condemning behavior which is “against nature”<sup>278</sup> and the creation story of Adam and Eve.<sup>279</sup>

Scholars, historians and theologians have offered extensive arguments that the original texts of these passages, construed in light of the linguistic, historical, political, and social context in which they were written<sup>280</sup>—and in which they were repeatedly translated<sup>281</sup>—

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270. See STANLEY J. GRENZ, WELCOMING BUT NOT AFFIRMING: AN EVANGELICAL RESPONSE TO HOMOSEXUALITY 157 (1998) (arguing that Christian communities cannot affirm “old sinful practices” that homosexuals must abandon); John F. Harvey, *Sexual Abstinence for the Homosexual Person*, 28 J. PASTORAL COUNSELING 40, 41-46 (1993).

271. See McNEILL *supra* note 266, at 1, 197-98; Symposium, *Homosexuality: Challenges for Change and Reorientation*, 28 J. PASTORAL COUNSELING 1 (1993); see also JOE DALLAS, A STRONG DELUSION: CONFRONTING THE “GAY CHRISTIAN” MOVEMENT 227-29 (1996) (offering the opinion of a self-described “former homosexual” author who asserts that sexual minority Christians can and must embrace heterosexuality).

272. See JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY 91-117 (1980) (discussing and refuting the various Biblical passages cited for condemnation of homosexuality).

273. See JOHN SHELBY SPONG, THE SINS OF SCRIPTURE: EXPOSING THE BIBLE’S TEXTS OF HATE TO REVEAL THE GOD OF LOVE 111-12 (2005) (setting forth scriptures cited for condemnation of homosexuality).

274. See *Genesis* 19:1-9.

275. See *Leviticus* 18:22 and 20:13.

276. See *Acts* 21:25; *Corinthians* 6:12-3.

277. See *Corinthians* 6:9; *Timothy* 1:1-10.

278. See *Romans* 1:26-27.

279. See *Genesis* 1-2.

280. See Victor Paul Furnish, *The Bible and Homosexuality: Reading the Texts in Context*, in HOMOSEXUALITY IN THE CHURCH: BOTH SIDES OF THE DEBATE 18 (Jeffrey S. Siker ed., 1994) [hereinafter HOMOSEXUALITY IN THE CHURCH].

281. See *id.* at 18-19 (demonstrating that the word “sodomite” is not found in the Hebrew text of the Old Testament or in the Greek text of the New Testament; that the word was used in fairly modern English translations; and that in this and other

were not intended as blanket condemnation of homosexuality, at least not sufficient to form a basic tenet of Christian faith.<sup>282</sup> The late Yale historian John Boswell championed a more neutral interpretation of these scriptures.<sup>283</sup>

Boswell and other theologians believe, for example, that God's destruction of Sodom was due not to homosexual behavior, but rather the residents' deadly sin of pride and failure to honor the "sacred right of hospitality."<sup>284</sup> These scholars similarly contend that the characterization from Leviticus of a man lying with another man as an "abomination" means that such behavior was "ceremonially unclean rather than inherently evil."<sup>285</sup> Boswell further believes that the "extreme selectivity" employed by Christian theologians in interpreting other Levitical laws provides "clear evidence that it was not their respect for the law which created their hostility to homosexuality, but their hostility to homosexuality which led them to retain a few passages from a law code largely discarded."<sup>286</sup>

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instances, multiple translations of the collection of books that form the Bible complicate its interpretation). The Old Testament was composed in ancient Hebrew and translated to ancient Greek, while the New Testament was written in ancient Greek. The Bible has since been translated into Syriac, Old Latin and other languages. See BREUILLY, *supra* note 234, at 47; DE HAMEL, *supra* note 256, at 305. The accuracy of the early translations, especially from Greek to Latin, is uncertain, as each voluminous part of the collection of manuscripts was copied by hand. See DE HAMEL, *supra* note 256, at 15. Serial corruption of original texts was highly probable, as each error may have been either repeated by subsequent scribes or compounded by erroneous corrections. *Id.* Translating and printing of the Bible in English was illegal until the Protestant Reformation took strong hold in England around 1538. *Id.* at 189.

282. See, e.g., DERRICK SHERWIN BAILEY, *HOMOSEXUALITY AND THE WESTERN CHRISTIAN TRADITION* 5-6, 172-73 (1955); BOSWELL, *supra* note 272, at 91-117; DANIEL A. HELMINIAK, *WHAT THE BIBLE REALLY SAYS ABOUT HOMOSEXUALITY: RECENT FINDINGS BY TOP SCHOLARS OFFER A RADICAL NEW VIEW* (2000); Perry, *supra* note 264, at 454-68 (arguing for interpretation of biblical text about homosexuality in light of current knowledge and experience). In a similar vein, feminist theologians have argued for interpretations of the Bible from original text that reject patriarchy and misogyny to give women a more powerful role in Christianity. See MARY DALY, *BEYOND GOD THE FATHER: TOWARD A PHILOSOPHY OF WOMEN'S LIBERATION* 3-7, 44-46 (1973); ROSEMARY RADFORD RUETHER, *SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY* 22-27 (1983); Phyllis Trible, *Feminist Hermeneutics and Biblical Studies*, in *FEMINIST THEOLOGY: A READER* 23, 25 (Ann Loades ed., 1990).

283. See BOSWELL, *supra* note 272, at 91-117. See generally *BIBLICAL ETHICS AND HOMOSEXUALITY: LISTENING TO SCRIPTURE* (Robert L. Brawley ed., 1996) (presenting views on both sides of the debate).

284. BOSWELL, *supra* note 272, at 94-96; see also GOMES, *supra* note 256, at 150-52; HELMINIAK *supra* note 282, at 43-50; MCNEILL, *supra* note 266, at 42-50; SPONG, *supra* note 273, at 127-33; Simon John DeVries, *Scenes of Sex and Violence in the Old Testament*, in *1 THE DESTRUCTIVE POWER OF RELIGION: VIOLENCE IN JUDAISM, CHRISTIANITY AND ISLAM* 75, 96 (J. Harold Ellens ed., 2004).

285. BOSWELL, *supra* note 272, at 101-02; see also SPONG, *supra* note 273, at 121-26; GOMES, *supra* note 256, at 153-55; HELMINIAK, *supra* note 282, at 51-73; MCNEILL, *supra* note 266, at 56-60.

286. BOSWELL, *supra* note 272, at 105.

Progressive scholars and theologians also note the absence of references to homosexuality elsewhere in the Bible. If condemnation of sexual minorities was meant to be a primary tenet of Christianity, they argue, it would have been given prominent mention in the Ten Commandments, the Summary of the Law, the teachings of major Prophets and by Jesus.<sup>287</sup> When one turns to pre-translation text, Boswell explained, neither the word “homosexual” nor equivalent language appeared in these manuscripts.<sup>288</sup> Thus, Boswell concluded, “[i]t is . . . quite clear that nothing in the Bible would have categorically precluded homosexual relations among the early Christians,”<sup>289</sup> in part because the “ancient world” in which the Bible was written “knew no such hostility to homosexuality.”<sup>290</sup>

Through these and other interpretations of Biblical passages,<sup>291</sup> Biblical scholars presented factual information that could both trigger CSRA and transformative revisions of Christians’ meaning schemes and meaning perspectives on sexual minorities. To date, however, these academic dissections of the Bible have not transformed the official teachings of the predominant Christian denominations in the United States.<sup>292</sup> The continued Christian condemnation of homosexuality is not due to perceived flaws in the exegesis

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287. See GOMES, *supra* note 256, at 147-48, 159-62.

288. BOSWELL, *supra* note 272, at 92, 103; see also GOMES, *supra* note 256, at 159-63.

289. BOSWELL, *supra* note 272, at 92.

290. *Id.* at 103; see also MCNEILL, *supra* note 266, at 50-53.

291. Boswell and others note that Levitical precepts on purity—such as circumcision, not eating pork, shellfish and rabbit, not wearing clothing made from more than one fabric, not sewing two kinds of seeds in one field and not cutting the hair or beard—have never been elevated to the status of condemnation leveled by Christians against homosexuals. See BOSWELL, *supra* note 272, at 102-05; SPONG, *supra* note 273, at 121-26; see also L. WILLIAM COUNTRYMAN, DIRT, GREED AND SEX: SEXUAL ETHICS IN THE NEW TESTAMENT AND THEIR IMPLICATIONS FOR TODAY 30-32, 124-43 (1988) (contending that the purity codes of the Old Testament were largely superseded by the New Testament’s internalization of matters related to purity). For refutations of other scriptures that allegedly condemn sexual minorities, see BOSWELL, *supra* note 272, at 105-17; GOMES, *supra* note 256, at 155-72; HELMINIAK *supra* note 282, at 75-116; MCNEILL *supra* note 266, at 53-66. Refutation of Saul/St. Paul’s alleged condemnation is perhaps best articulated in SPONG, *supra* note 273, at 135-42.

292. See SPONG, *supra* note 273, at 113-19 (suggesting that Boswell’s and other theologians’ work has resounded with certain leaders within conservative denominations, but has not inspired doctrinal changes). In a column written by the Catholic Archbishop of Milwaukee twenty-five years ago, for example, the Archbishop acknowledged, “[c]urrent biblical scholarship has been of tremendous help in bringing” the Old and New Testament passages referring to homosexuality “into a total cultural context.” Archbishop Rembert Weakland, *Who is Our Neighbor?*, in VOICES OF HOPE, *supra* note 124, at 20-22. But see Deirdre Good, *The New Testament and Homosexuality: Are We Getting Anywhere?*, 26 RELIGIOUS STUD. REV. 307, 310 (2000) (concluding that there is “no likelihood that debates about the Bible and homosexuality will end soon”).

undertaken by Boswell and others.<sup>293</sup> Rather, lack of receptivity is grounded in many Christians' beliefs as to what the Bible is and its applicability to the modern world, with both beliefs posing major obstacles to transformative learning about sexual minorities.

Conservative Christians believe the Bible was recorded by human scribes but contains the word of God.<sup>294</sup> Viewed from this perspective, the miracles and other events described in the Bible actually occurred, including God's casting of Adam and Eve out of the Garden of Eden and the great flood that only Noah and his family survived.<sup>295</sup> Modern interpretations must be based on literal readings of contemporary versions of the Bible, Biblical Fundamentalists believe, because only literal interpretations accurately reveal the doctrine and moral codes that lead to eternal salvation.<sup>296</sup>

Bible Fundamentalists reject any possibility of historical-critical reading as advocated by Boswell and other non-Fundamentalist theologians.<sup>297</sup> As one fundamentalist explained, "with respect to the matter of homosexual sin Holy Scripture has traced a most distinct and unmistakable line in stone."<sup>298</sup> Biblical Fundamentalism offers no explanation as to why some scriptures are literally enforced while others are ignored,<sup>299</sup> but it does explain why Christians whose meaning schemes and meaning perspectives about sexual minorities

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293. See GOMES, *supra* note 256, at 368-70 n.1 (discussing various criticisms of Boswell's work). See generally *HOMOSEXUALITY IN THE CHURCH*, *supra* note 280.

294. When campaigning for president, for example, Jimmy Carter was called upon to reconcile comments supporting an end to discrimination against homosexuals with his evangelical Christian faith. In language reflecting Biblical fundamentalism, Carter retreated from his previous pro-gay stance, stating, "I can't change the teachings of Christ! I believe in them, and a lot of people in this country do, as well." CLENDINEN & NAGOURNEY, *supra* note 71, at 282 (quoting Carter).

295. See MARCUS J. BORG, *THE HEART OF CHRISTIANITY: REDISCOVERING A LIFE OF FAITH* 15-16, 43-44 (2003).

296. See *id.*

297. See HELMINIAK *supra* note 282, at 33. Biblical Fundamentalism among Protestant denomination is somewhat ironic in that all Protestant denominations owe their existence to Martin Luther, a sixteenth century Catholic monk who argued that Christians could find their own truth in the Bible without intervention by the Pope or lesser clergy. See PALMER & COLTON, *supra* note 234, at 70.

298. Patrick Henry Reardon, Editorial, *The Churches & the Homosexual Agenda*, TOUCHSTONE, Oct. 2000, at 8.

299. See *Leviticus* 11:1-12 (forbidding the eating of all unclean animals, including pigs, rabbits and shellfish); *Leviticus* 23:3-4 (containing detailed regulations about resting on the Sabbath); *Leviticus* 19:19 (prohibiting individuals from wearing a garment made of two types of material); *Leviticus* 19:27 (prohibiting men from shaving their beards). Despite the clarity of such passages, modern Christians are not known to condemn clean-shaven males, people who wear polyester clothing, eat pork or work on Sunday. *Leviticus* also requires that anyone who curses his father or mother, commits adultery or becomes a fortuneteller to be put to death. *Leviticus* 20:9, 10, 27. Again, there has been no organized Christian movement to make such offenses death penalty eligible.



are based in Fundamentalism are unlikely candidates for transformative learning<sup>300</sup> in this country or elsewhere.<sup>301</sup> As explained immediately below, however, some Christians are demonstrating significant alterations in their meaning schemes and perspectives about sexual minorities.

### *3. Transformation and the Emerging Christian Paradigm*

Of course, bigotry will have its day, and will claim to have God on its side . . . . Thus it has always been. But more reasoned voices also emerge from within religion.<sup>302</sup>

In what theologian Marcus Borg describes as “the emerging paradigm,”<sup>303</sup> Christians view the Bible as written by humans inspired by God, but not the exact word of God; rather, it is an ancient book written to guide a different people in a different time.<sup>304</sup> In contrast to the Fundamentalist perspective, emerging Christians perceive Biblical text as “living and not . . . static,” demanding that Christianity’s adherents “determine in what ways it can, and possibly cannot, speak to its present hearers and readers.”<sup>305</sup> Christians who follow this path do so as “a response to the Enlightenment,”<sup>306</sup> embracing the stories of the Bible as metaphor,<sup>307</sup> and seeing Christianity “as a life of relationship and transformation.”<sup>308</sup>

The emerging paradigm includes moderate<sup>309</sup> and progressive

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300. See PollingReport.com, Virginia Commonwealth University Life Sciences Survey, Sept. 3-26, 2003, <http://www.pollingreport.com/religion.htm> (last visited Mar. 20, 2005) (demonstrating that in a nationwide survey of adults conducted in 2003, forty-two percent of respondents believed that the Bible is the “actual Word of God,” thirty-seven percent believed it “is the Word of God but not everything in it should be taken literally,” and fourteen percent believed it was “written by men and is not the Word of God”).

301. See Cece Cox, *To Have and to Hold—or Not: the Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 *LAW & SEXUALITY* 1, 6-22 (2005).

302. See HELMINIAK, *supra* note 282, at 18.

303. BORG, *supra* note 296, at 6, 13-14 (explaining that the “emerging paradigm” has existed for over a century and centers on alternative ways of viewing and experiencing the Bible and Christian life).

304. See *id.* at 13, 45-49.

305. GOMES, *supra* note 256, at 74.

306. BORG, *supra* note 296, at 13.

307. See *id.* at 13, 49-57.

308. *Id.* at 14.

309. See John C. Danforth, *Onward, Moderate Christian Soldiers*, N.Y. TIMES, June 17, 2005, at A27 (explaining that for moderate Christians, “the only absolute standard of behavior is the commandment to love our neighbors as ourselves,” a mandate that requires opposing a same-sex marriage amendment to the Constitution “that would

Christians open to the possibility of transformative learning about sexual minorities and other topics of theological debate. As one theologian explained, “while the [Biblical] text itself does not change, we who read that text do change. . . . Thus we hear not as first-century Christians, or even as eighteenth-century Christians, but as men and women alive here and now.”<sup>310</sup>

Viewed through a twenty-first century prism that reflects accurate factual information about sexual minorities and encourages CSRA, the Bible’s alleged proscriptions against homosexuality are relegated to near irrelevancy, and the stage is set for transformative learning about sexual minorities. As a Lutheran clergyman explained, “[f]or many denominations, human sexuality is not simply a matter of faithfulness to biblical teaching, but one of scriptural interpretation and compassionate application.”<sup>311</sup> A Christian congregation in Ohio made the point even more succinctly. “Our faith is over [two-thousand] years old,” the church declared on billboards and posters.<sup>312</sup> “Our thinking is not.”<sup>313</sup>

Borg believes that Christians started moving towards the emerging paradigm more than a century ago, but its force as a “major grassroots movement among both laity and clergy” in this country occurred mostly in the past two or three decades.<sup>314</sup> This evolution is not limited to U.S. Christians.<sup>315</sup>

According to Borg, many Protestant denominations have responded favorably to the movement, becoming more open and affirming to sexual minorities in the process.<sup>316</sup> Churches moving forward on Borg’s progressive scale include the “United Church of Christ, the Episcopal Church, the United Methodist Church, the Christian Church (Disciples of Christ,) the Presbyterian Church USA, the American Baptist Convention and the Evangelical Lutheran

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humiliate homosexuals”).

310. GOMES, *supra* note 256, at 20.

311. Peter Mikelic, *Lutherans Address Same-Sex Unions*, TORONTO STAR, Mar. 12, 2005, at M06.

312. Brad Jagger, *God Is Still Speaking, in North Jackson*, UNITED CHURCH NEWS (Ohio Conf. Ed.), Nov. 2004, at A7 (describing the use of a billboard message as part of a church growth campaign in North Jackson, Ohio, in the summer and fall of 2004). The church includes the United Church of Christ, Presbyterian and Disciples of Christ and others with no specific denomination. *Id.*

313. *Id.*

314. BORG, *supra* note 296, at 6.

315. See, e.g., Christopher Morgan, *Bishop Sanctions Service for Gays*, SUNDAY TIMES (London), Jan. 9, 2005, at 6 (reporting on the introduction of an official service in honor of same-sex couples by Anglican Bishop John Saxbee of the Church of England).

316. See BORG, *supra* note 296, at 6.

Church in America.”<sup>317</sup> Borg even notes some signs of movement within the Roman Catholic Church,<sup>318</sup> the largest Christian denomination in this country.<sup>319</sup> Religiously affiliated groups formed by sexual minorities and their allies include Dignity/USA and New Ways Ministry (Catholic), Honesty (Southern Baptist), Integrity (Episcopalian), Acceptance (United Methodist), Lutherans Concerned, Gay and Lesbian Mormons and More Light

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317. *Id.*; see also Brief Amicus Curiae of Clergy Members in Support of Marriage et al. as Amici Curiae Supporting Appellants, *Lewis v. Harris*, No. A-002244-03T5 (N.J. Super. Ct. App. Div. 1998) [hereinafter Brief Amicus Curiae of Clergy Members] (arguing in support of same-sex marriages). The Amici included more than one hundred clergy members and was comprised of Unitarian, Episcopal, United Methodist, Lutheran, United Church of Christ, Congregational, Presbyterian and nondenominational Christian pastors, as well as a number of Jewish rabbis. *Id.* Even denominations that have a generally liberal bent often find themselves split on issues related to sexual minorities. See, e.g., Laurie Goodstein, *Changes in Episcopal Church Spur Some to Join, Some to Go*, N.Y. TIMES, Dec. 29, 2003, at A1 (reporting the impact from the New Hampshire Episcopal Diocese’s decision to elect openly gay Reverend V. Gene Robinson as its bishop); Jane Gordon, *A Debate Filled with Faith*, N.Y. TIMES, Mar. 6, 2005, at 14CN (discussing ongoing tensions within the Episcopal Church, the United Church of Christ, the Methodist church, and other denominations over the ordination of gay ministers and same-sex marriage).

318. See BORG, *supra* note 296, at 6. Borg’s characterization of the Catholic Church as potentially progressive seems overly optimistic in light of the late Pope John Paul II’s repeated characterization of homosexuality as evil and the Church’s 2005 selection of ultra-conservative Cardinal Joseph Ratzinger as John Paul’s successor. See Christopher Dickey et al., *The Vision of Benedict XVI*, NEWSWEEK, May 2, 2005, at 40; Michael Paulson, *Pope says Gay Unions Are False, Sees a Weakening of Marriage*, B. GLOBE, June 7, 2005, at A1. See generally MCNEILL, *supra* note 266, at 42-50 (describing the Roman Catholic position on homosexuality and its reticence to changing that position); Peter Hebblethwaite, *Please Don’t Shoot the Bearer of Bad Tidings: An Open Letter on Cardinal Ratzinger’s Document*, in THE VATICAN AND HOMOSEXUALITY: REACTIONS TO THE “LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS” 133 (Jeannine Gramick & Pat Furey eds., 1988) [hereinafter VATICAN AND HOMOSEXUALITY] (explaining and critiquing then-Cardinal Ratzinger’s views on homosexual congregants); DIALOGUE ABOUT CATHOLIC SEXUAL TEACHING, in READINGS IN MORAL THEOLOGY No. 8, 297-330 (Charles E. Curran & Richard A. McCormick eds., 1993) (providing official Church positions and discussions on a range of sexual issues including homosexuality). On the other hand, U.S. Catholic Bishops issued a directive on September 10, 1997 urging parents to love and support their gay children. See U.S. Conference of Catholic Bishops, *Statement of the Bishop’s Committee on Marriage and Family: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers* (1997), available at <http://www.usccb.org/laity/always.shtml>. The Catholic Church also takes this position regarding discrimination against sexual minorities: “[t]he number of men and women who have deep-seated homosexual tendencies is not negligible.” THE HOLY SEE ARCHIVE, THE VATICAN: CATECHISM OF THE CATHOLIC CHURCH § 2358 (1994), available at <http://www.vatican.va/archive/ENG0015/P85.HTM>. “They do not choose their homosexual condition,” and “[t]hey must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.” *Id.*

319. See Joseph Carroll, *American Public Opinion About Religion*, THE GALLUP POLL NEWS SERVICE, March 2, 2004, available at <http://poll.gallup.com/content/default.aspx?CI=10813> (reporting that about twenty-four percent of the U.S. population identifies as Catholic, forty-nine percent consider themselves Protestants and ten percent “identify with some other form of the Christian religion”).

Presbyterians.<sup>320</sup> Interdenominational groups<sup>321</sup> also engage church leaders about issues affecting the spiritual and secular lives of people outside the heterosexual paradigm.<sup>322</sup> Their outness and advocacy enhance opportunities for fellow Christians to engage in CSRA that challenges stereotypes and myths about sexual minorities.<sup>323</sup>

Increasing visibility of sexual minorities within congregations and continuing cross-denominational advocacy have resulted in religious groups taking high-profile stands on civil rights issues. The controversy over same-sex marriage has been a divining rod for separating Christian denominations and congregations into fundamentalist and emerging camps.<sup>324</sup> For example, more than 146 religious leaders from Baptist, Episcopal, Presbyterian, Unitarian and United Methodist congregations submitted a joint amicus brief supporting same-sex marriage in New York State,<sup>325</sup> while Catholic,<sup>326</sup>

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320. Each group has an Internet home page that can be accessed through any general search engine. See generally LISA BENNETT, HUM. RTS. CAMPAIGN FOUND., MIXED BLESSINGS: ORGANIZED RELIGION AND GAY AND LESBIAN AMERICANS IN 1998 (1998) (reporting in a monograph prepared for HRC on developments affecting and caused by sexual minorities in many U.S. Christian denominations and Judaism).

321. See Letter from Cathy Nelson, Vice-President of Development & Membership, Human Rights Campaign, to Human Rights Campaign Members (Apr. 2005) (on file with author) (explaining that the organization planned to start a Religion Project in order "to engage people and communities of faith, as well as their leaders, in an open dialogue" and to "better establish in Americans' minds the legitimate sacred foundations of equality in many, if not most, religious traditions"). HRC's undertaking joins a host of existing collaborations including the United Church of Christ Coalition for Lesbian, Gay, Bisexual and Transgender Concerns; the National Religious Leadership Roundtable hosted by the National Gay and Lesbian Task Force; and Soulforce, founded by the Reverend Mel White.

322. Of course, dissent within Christian denominations is not always well received, especially from sexual minorities. See, e.g., MEL WHITE, STRANGER AT THE GATE: TO BE GAY AND CHRISTIAN IN AMERICA (1994); MELANIE MORRISON, THE GRACE OF COMING HOME: SPIRITUALITY, SEXUALITY, AND THE STRUGGLE FOR JUSTICE (1995).

323. See generally FROM WOUNDED HEARTS: FAITH STORIES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDERED PEOPLE AND THOSE WHO LOVE THEM (Roberta Showalter Krieder ed., 1998) (documenting individuals' struggles, courage and success associated with being open about their minority sexual status in Christian communities).

324. See Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427, 428-31, 437-38 (2004) (explaining the role of religion in the same-sex marriage debate); Perry, *supra* note 264, at 454-60 (analyzing same-sex marriage in the context of Christianity).

325. See Doug Windsor, Arguments Filed in NY Gay Marriage Suit, available at <http://www.365gay.com/newscon05/05/051905nyAppeal.htm> (last visited Mar. 20, 2005). Progressive clergy have previously taken public stands on controversial issues including the exclusion of homosexuals from the military. See THE CHRISTIAN ARGUMENT FOR GAY AND LESBIANS IN THE MILITARY: ESSAYS BY MAINLINE CHURCH LEADERS (John J. Carey ed., 1993) (including supportive essays written by Lutheran, Presbyterian, American Baptist, Methodist, Roman Catholic and Unitarian-Universalist ministers).

326. See Jenna Russell, *Bishop Calls SJC Decision 'Tragedy'*, BOSTON GLOBE, Nov. 30, 2003, at B1 (reporting on Catholic bishops' negative reaction to decision legalizing same-sex marriage in Massachusetts and their continued support for a

Southern Baptists<sup>327</sup> and other conservative Christian clergy vociferously condemned same-sex unions.

When analyzing the transformative learning that has occurred or will occur within Christianity concerning sexual minorities, one must consider that change generally occurs within individuals before it affects organizations. Although people's religious beliefs clearly inform their secular actions (including voting and advocating for particular governmental policies), adherence to a specific Christian denomination does not dictate adherence to all standards and norms of that denomination.

The 2004 presidential election provides a case in point. The so-called "blue states" in the northeast contain the largest numbers of Roman Catholics in the country.<sup>328</sup> Yet, these states voted heavily in favor of John Kerry, the pro-choice presidential candidate, indicating that many Catholics in this region rejected their Church's denouncement of a pro-choice candidate.<sup>329</sup> Many of the sixty-five million U.S. Catholics<sup>330</sup> also reject their church's teachings on contentious issues including the use of birth control and the death penalty.<sup>331</sup> Indeed, one nationwide survey of Catholic adults revealed that eighty-six percent of Catholics believed they could "disagree with the Pope on articles of faith and still be a good Catholic."<sup>332</sup> A

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federal constitutional amendment banning same-sex marriage).

327. See John Kooper, *Southern Baptists Wage Savage Political Warfare over Gay Couples*, TENNESSEAN, Nov. 19, 2003, at 19A; Peter Steinfelds, *Southern Baptists Condemn Homosexuality as 'Depraved'*, N.Y. TIMES, June 17, 1988, at B6.

328. See Jeffrey M. Jones, *Tracking Religious Affiliation, State by State*, GALLUP POLL NEWS SERVICE, June 22, 2004, available at <http://poll.gallup.com/content/default.aspx?ci=12091> (listing states with the highest percentage of Catholics, including Rhode Island (fifty-two percent of the state's population), Massachusetts (forty-eight percent), New Jersey (forty-six percent), Connecticut (forty-six percent), New York (forty percent) and New Hampshire (thirty-eight percent)).

329. See PollingReport.com, Religion, ABC News/Washington Post Poll, May 20-23, 2004, <http://www.pollingreport.com/religion.htm> (last visited Mar. 20, 2005) (indicating that in a nationwide poll, seventy-two percent of Catholics opposed "denying communion to Catholic politicians who are in favor of legal abortion").

330. See John Caldwell, *Can the Catholic Church be Saved?*, ADVOCATE, May 10, 2005, at 34, 38.

331. See, e.g., Lisa Miller et al., *Prayers for a New Life: Catholics Celebrate a Legacy, and Contemplate Many Difficult Choices Ahead*, NEWSWEEK, Apr. 18, 2005, available at <http://www.msnbc.msn.com/id/7446931/site/newsweek/> (reporting on a recent Gallup poll showing that almost seventy percent of "U.S. churchgoing Catholics" disagree with the Church's ban on birth control and that many Catholics also disagree with the Church's stand on premarital sex and celibacy of priests); Frank Newport, *U.S. Catholics Vary Widely on Moral Issues: Active Catholics Much More Conservative*, GALLUP POLL NEWS SERVICE, Apr. 8, 2005, available at <http://poll.gallup.com/content/default.aspx?ci=15550&pg=1> (reporting that a significant number of Catholics find abortion, the death penalty, physician-assisted suicide, homosexual behavior, divorce and embryonic stem cell research morally acceptable, despite their Church's contrary teachings).

332. See PollingReport.com, Religion, CNN/Time Poll, Jan. 20-21, 1999, <http://>

national survey conducted in 2004 showed that the majority of Catholic youth approve of same-sex marriage, despite the Church's profound and repeated condemnation of such unions.<sup>333</sup> Efforts to transform the Catholic Church by engaging its leaders in CSRA about sexual minorities continues from within, with advocates refusing to be denied or discouraged even when faced with repressive official doctrine.<sup>334</sup>

Evidence further suggests that younger Christians in general may be receptive to—or have already engaged in—transformative learning about sexual minorities. A nationwide study of college students showed that approximately seventy-five percent of the students identified as Christian, seventeen percent had no religious preference and the remaining eight percent were Jewish, Islamic, Hindu or another religion.<sup>335</sup> Researchers found that approximately eighty percent of these students believe in God, have an interest in spirituality and discuss religion or spirituality with friends and family.<sup>336</sup>

After analyzing the students' responses to myriad questions about religion, spirituality and social issues, researchers concluded that “[d]espite their strong religious commitment, students also demonstrate a high level of religious tolerance and acceptance,”<sup>337</sup> and that more than seventy percent “are actively engaged in ‘trying to change things that are unfair in the world.’”<sup>338</sup> Perhaps rectifying the many inequities imposed upon sexual minorities in this country will fall within their spiritual agendas.<sup>339</sup>

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[www.pollingreport.com/religion.htm](http://www.pollingreport.com/religion.htm) (last visited Mar. 20, 2005).

333. See Albert L. Winseman, *Religion Colors Teen Views of Gay Marriage*, GALLUP POLL NEWS SERVICE, Sept. 14, 2004, available at <http://poll.gallup.com/content/default.aspx?ci=13015&pg=1> (finding that fifty-two percent of Catholic teens surveyed approve of marriage between homosexuals and attributing the results to the larger “disconnect between the ‘official’ Catholic” doctrine and the beliefs and practices of Catholic youth).

334. See Caldwell, *supra* note 330, at 38 (describing efforts of the New Ways Ministry and other Catholics to support and increase the number of gay-friendly parishes).

335. See HIGHER EDUC. RESEARCH INST., *THE SPIRITUAL LIFE OF COLLEGE STUDENTS: A NATIONAL STUDY OF COLLEGE STUDENTS' SEARCH FOR MEANING AND PURPOSE* 17 (2004).

336. See *id.* at 5.

337. *Id.* at 4.

338. *Id.* at 5.

339. Not surprisingly, college students with lower levels of “religious engagement” (measured by regular church attendance and reading of sacred scripture) responded more favorably to issues surrounding sexual minorities than did students with high levels of engagement in organized religion. *Id.* at 10. For example, seventy-six percent of students with low religious engagement believed that same-sex couples should have the right to marry and only sixteen percent agreed that the law should prohibit homosexual relationships. *Id.* Among students with high religious

No one can credibly assert that the grassroots, “emerging paradigm” described by Borg will soon result in universal changes in Christian doctrine concerning sexual minorities. Resistance to change of any type, especially on issues of sexuality, remains common in many conservative Christian denominations whose membership rolls are growing<sup>340</sup> and whose leaders are spearheading the crusade against sexual minorities.<sup>341</sup> Nonetheless, the emerging paradigm cannot be lightly dismissed.

As Borg observed, the debates within and among religions about same-sex marriage, ordination of sexual minorities and related topics were “virtually unimaginable a few decades ago.”<sup>342</sup> Today it is hard for Christians to escape such debates.<sup>343</sup> Ironically, the heightened emphasis that conservative religious leaders have placed on sexual orientation may affirm some Christians’ negative views of sexual minorities, but the discourse surrounding those debates may also plant seeds of doubt in other Christians’ minds. Once such seeds of transformative learning about sexual minorities have been sown, whether across congregations or within individuals, they have significant potential to inspire CSRA and ultimately to effectuate change.<sup>344</sup>

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engagement, only twenty-eight percent approved of same-sex marriage and fifty-three percent thought homosexual relationships should be banned. *Id.*

340. See David Greenberg, *Fathers and Sons: George W. Bush and His Forebears*, NEW YORKER, July 12 & 19, 2004, at 97, available at <http://www.newyorker.com/critics/books/?040712crbobooks> (noting that between 1960 and 2000, “membership in the Southern Baptist Convention grew from ten million to seventeen million” and Pentecostal adherents increased from fewer than two million to almost twelve million members); see also Laurie Goodstein, *Conservative Churches Grew Fastest in 1990’s*, *Report Says*, N.Y. TIMES, Sept. 18, 2002, at A22 (noting that membership in conservative Christian churches has skyrocketed, siphoning members from more moderate churches such as the Presbyterian Church USA).

341. See Moser, *supra* note 4 (describing the anti-gay agendas of Christian associated groups including the Family Research Council, Focus on the Family, and the Traditional Values Coalition); see also CYNTHIA BURACK & JYL J. JOSEPHSON, NAT’L GAY AND LESBIAN TASK FORCE POL’Y INST., A REPORT FROM “LOVE WON OUT: ADDRESSING, UNDERSTANDING AND PREVENTING HOMOSEXUALITY” (2005) (providing a “first-hand account” of factually incorrect information distributed at an “ex-gay” conference sponsored by Focus on the Family); Kooper, *supra* note 327.

342. BORG, *supra* note 296, at 3; see James K. Wellman, Jr., *The Debate over Homosexual Ordination: Subculture Identity Theory in American Religious Organizations*, 41 REV. RELIGIOUS RES. 184, 201 (1999) (concluding that symbolic traditions have caused clear ideological differences within elite religious leadership on the issue of homosexuality).

343. See generally HOMOSEXUALITY AND CHRISTIAN FAITH, *supra* note 207.

344. Debates over same-sex marriage have resulted in many Christian clergy voicing support for sexual minority equality. See, e.g., Diane Carroll, *Ministers Protest Proposed Gay-Marriage Ban*, KAN. CITY STAR, Mar. 26, 2005, at B4 (stating that “[m]ore than fifty ministers,” including those from United Methodist and Baptist faiths, signed a letter urging voters to reject the state constitutional amendment outlawing same-sex marriage); Vanessa Ho, *Religious Leaders Step Up Support of Gay Rights*, SEATTLE POST-INTELLIGENCER, Feb. 14, 2005, at B2; Ryan Lee, *Black Clergy*

### *C. Science and Sexuality*

From the origins of the first homosexual rights movement . . . there has been an ongoing effort to use scientific knowledge as one means to emancipate homosexual men and women from the tyranny of moral ostracism, legal punishment, and medical treatment.<sup>345</sup>

For at least a century, science was hostile to the emancipatory movement for sexual minorities. Science's enlightened (and enlightening) transformation on issues related to sexuality and sexual identity over the past few decades is discussed in the following section.

#### *1. Science's Influence on U.S. Law*

Like Christianity, science has greatly influenced behavior-identity compression and the concomitant legal disenfranchisement of sexual minorities. The relationship between science and law, however, is less intimate than Christianity and law. Recurring conflicts arise because "[s]cience assumes behavior is largely determined by biology and experience," while "the law typically assumes man has free will."<sup>346</sup> The rift widens as science strives to understand humanity by racing toward new discoveries and creating new knowledge,<sup>347</sup> while law seeks to regulate humanity and discourage change by being unapologetically anchored in precedent and tradition.<sup>348</sup> Indeed, "[t]he law's prestige depends largely on adhering to the traditions of the past, while science's prestige turns on how swiftly it advances into

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*Unite to Publicly Support Gay Rights: Pastors Offer 'A More Hope-Filled Perspective,'* SOUTHERN VOICE, Feb. 4, 2005, available at <http://sovo.com/2005/2-4/news/localnews/clergy.cfm>; Dennis O'Brien, *Clergy Gather in Favor of Gay Marriage*, BALTIMORE SUN, Feb. 9, 2005, at 2B (reporting that seventy-one Christian ministers signed a petition supporting same-sex marriage); Anita Weier, *Christians Clash on Gay Unions: Opponents of State Ban Rally at Capitol*, CAP. TIMES, Feb. 23, 2005, at 3A (reporting that "thirty pastors from various churches around the state" attended a rally in opposition to a Wisconsin constitutional amendment banning same-sex marriages).

345. HENRY L. MINTON, *DEPARTING FROM DEVIANCE: A HISTORY OF HOMOSEXUAL RIGHTS AND EMANCIPATORY SCIENCE IN AMERICA* 3 (2002). Medical science also offers data critical to the equality movement for transgender persons. See generally Jennifer L. Levi, *A Prescription for Gender: How Medical Professionals Can Help Secure Equality for Transgender People*, 4 GEO. J. GENDER & L. 721 (2003).

346. FAIGMAN, *supra* note 196, at 6.

347. See GOLDBERG, *supra* note 190, at 11 (explaining that "[m]any scientists do care greatly about the ultimate practical impact of their work, but that concern is often secondary to the fundamental search for knowledge").

348. See CAIN, *supra* note 22, at 281 (explaining, "[l]aw is rooted in the past and its consistency over time is one of its values"). See generally ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 141-54 (2002) (discussing the limitations of using the courts to seek equality for sexual minorities).



the future.”<sup>349</sup> These antithetical perspectives mean that once the law finally accepts a particular scientific theory as legally credible, the law resists all subsequent scientific challenges to—or revisions of—that theory.<sup>350</sup>

The law’s recalcitrance to accept scientific revision is demonstrated by the current gap between law and science on issues relates to sexual minorities.<sup>351</sup> The temporal disconnect between science and law also explains why science’s past condemnation of sexual minorities casts such a long shadow over contemporary law. This historic pattern further suggests, however, that (1) the law will eventually assimilate contemporary scientific findings that variations in gender, sexual identity and sexual orientation are naturally occurring and harmless, rather than deviant and pathological;<sup>352</sup> and (2) once the credibility of these scientific models is recognized by courts and legislatures, laws favoring sexual minorities will be hard to challenge. The scientific developments about the benign nature of sexual minorities now infiltrating our legal system<sup>353</sup> also offer opportunities for transformative learning by the general public.

This section explains why medical and social science researchers, clinicians and practitioners have removed the blinders that previously limited the scientific definition of “normalcy” to heterosexual people whose gender identity conformed to the classic male-female binary model.<sup>354</sup> The role that science’s shifting perspective plays in helping change the law and science’s role in society’s transformative learning process about sexual minorities are also noted.<sup>355</sup>

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349. FAIGMAN, *supra* note 196, at 6.

350. See Friedman & Downey, *supra* note 101, at 928 (stating that sufficient scientific “data ha[s] accumulated to warrant the dismissal of incorrect ideas once widely accepted about homosexual people,” but observing that “[m]any areas of law and public policy are still influenced by views discarded by behavioral scientists”).

351. See *id.* (stating that many states still penalize homosexual conduct without having any “data from scientific studies to justify the unequal treatment”).

352. See generally Patricia J. Falk, *The Prevalence of Social Science in Gay Rights Cases: The Synergistic Influences of Historical Context, Justificatory Citation, and Dissemination Efforts*, 41 WAYNE L. REV. 1 (1994) (concluding that the failure of the United States Supreme Court to initiate change in the area of gay rights has caused participants in gay rights cases to rely heavily on social science data in their litigation); Ramsey & Kelly, *supra* note 96 (recommending that judges consider findings of contemporary social scientists to a greater degree when adjudicating family law cases).

353. See *supra* Part I.A.2.

354. Proposals for science and society to recognize an “intermediate sex” have not been embraced. See, e.g., Edward Carpenter, *The Intermediate Sex: A Study of Some Transitional Types of Men and Women*, in *HOMOSEXUALITY: A CROSS CULTURAL APPROACH*, *supra* note 83, at 143-55.

355. The relationship between scientific developments and shifts in public opinion is grounded in the public’s respect for medical doctors and scientists and public interest in new scientific developments, especially medical discoveries. See NATIONAL SCIENCE BOARD, *SCIENCE & ENGINEERING INDICATORS – 2002*, 7-8 (2002), available at

## 2. *Mental Health Perspectives on Homosexuality*

As a practicing psychiatrist, I regard homosexuality as an illness . . . .  
I regard homosexuality as essentially a symptom of an overall  
pattern of maladjustment.<sup>356</sup>

Somehow we must convey to you how your subjective value  
judgments deny homosexuals a part in the good life and how . . .  
you have become the guardians of mental illness rather than  
promoting . . . mental health . . . in our society.<sup>357</sup>

Historically, psychiatrists and psychologists characterized sexual minorities as mentally ill.<sup>358</sup> This characterization supported behavior-identity compression and for many decades justified discriminatory treatment of sexual minorities who failed to conform to the “normal” (and, therefore, ideal) heterosexual, male or female binary model.<sup>359</sup> In a divorce case involving the wife’s romantic involvement with another woman, for example, the court offered this rationale for finding that the wife’s conduct constituted extreme cruelty:

It is difficult to conceive of a more grievous indignity to which a person of normal psychological and sexual constitution could be exposed that[sic] the entry by his spouse upon an active and continuous course of homosexual love with another. Added to the insult of sexual disloyalty per se . . . is the natural revulsion arising from knowledge . . . that the spouse’s betrayal takes the form of a perversion . . . . Common sense and modern psychiatric knowledge

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<http://www.nsf.gov/statistics/seind02/pdf/c07.pdf> (reporting that in 2001, two-thirds of respondents to a National Science Foundation national poll said they were “very interested” in new medical discoveries and forty-seven percent said they were “very interested” in other scientific discoveries); *see also* Humphrey Taylor, *Doctors the Most Prestigious of Seventeen Professions and Occupations, Followed by Teachers (#2), Scientists (#3), Clergy (#4) and Military Officers (#5)*, HARRIS POLL, Oct. 10, 2001, *available at* [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=261](http://www.harrisinteractive.com/harris_poll/index.asp?PID=261) (suggesting that the public has high regard for medical doctors and scientists).

356. *Notes on Homosexuality*, *supra* note 112, at 26, 27 (quoting University of Pennsylvania Professor Samuel B. Hadden).

357. TOBIN & WICKER, *supra* note 76, at 61 (quoting Lesbian activist Del Martin speaking before the American Psychiatric Association in 1971).

358. *See, e.g.*, EDMUND BERGLER, *HOMOSEXUALITY: DISEASE OR WAY OF LIFE?* (1956); IRVING BIEBER ET AL., *HOMOSEXUALITY: A PSYCHOANALYTIC STUDY* (1962); Irving Bieber, *Homosexuality*, 69 AM. J. NURSING 2637 (1969); Albert Ellis, *The Truth About Lesbians*, in *SEX AND THE UNMARRIED WOMAN* 12, 13 (1964).

359. *See, e.g.*, *Boutilier v. I.N.S.*, 387 U.S. 118, 122 (1967) (upholding the conclusion by INS officials that petitioner’s homosexual conduct rendered him a “psychopathic personality” subject to deportation under federal law); *see also* Rivera, *Legal Position*, *supra* note 22, at 934-42 (noting that identifying an alien as a homosexual can have a dramatic impact on her immigration status).

concur as to the incompatibility of homosexuality and the subsistence of marriage between one so afflicted and a normal person.<sup>360</sup>

The American Psychiatric Association's ("APA's") highly influential *Diagnostic and Statistical Manual of Mental Disorders (DSM)*<sup>361</sup> cast one of the longest and darkest shadows over sexual minorities.<sup>362</sup> In the premier edition of DSM published in 1952, homosexuality was labeled a mental disorder.<sup>363</sup> The DSM classification was based on the belief that homosexuality stemmed from unresolved conflicts between parents and offspring that started in early childhood and rendered the child incapable of adjusting to a normal, heterosexual life as an adult.<sup>364</sup> Born of maladjustment, adult homosexuality represented "an inexhaustible source of unhappiness" paired with "a distorted sense of human values."<sup>365</sup> Sigmund Freud's model of human development was used as the foundation for the maladjustment theory<sup>366</sup> despite Freud's belief that homosexuality was not a mental illness.<sup>367</sup> The mental health profession rejected Freud on this point<sup>368</sup> in favor of Irving Bieber, Charles Socarides and others who pronounced, "[t]he homosexual is ill."<sup>369</sup>

The pathologized model of sexual minorities invigorated behavior-

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360. H. v. H, 157 A.2d 721, 726-27 (N.J. Super. Ct. App. Div. 1959).

361. See generally HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM – THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS (1997).

362. See generally RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS (1987).

363. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-I) 38 (1st ed. 1952).

364. See WEST, *supra* note 97, at 92 (concluding in a 1955 publication that homosexuality is connected "with particular kinds of upbringing," including situations where the only boy in a family "has a dominating, puritanical mother and no proper father," thus "provoking Oedipal conflicts and encouraging guilt dealings and sexual inhibitions"). See generally CHARLES W. SOCARIDES, HOMOSEXUALITY (1978); Thompson, *supra* note 101.

365. Franz J. Kallmann, *Twin and Sibship Study of Overt Male Homosexuality*, 4 AM. J. HUM. GENETICS 136, 146 (1952).

366. See Thompson, *supra* note 101, at 184 (noting that Freud's "inverted Edipus complex is presented as the starting point of homosexual development").

367. See THE GAY RIGHTS MOVEMENT, *supra* note 74, at 31 (reporting that when asked by an American mother if her homosexual son could be cured, Freud responded that "in the majority of cases" it is not possible; Freud further advised that psychoanalysis may bring the son "peace of mind" and "full efficiency" regardless of his sexual orientation); see also Henry Abelove, *Freud, Male Homosexuality, and the Americans*, in THE LESBIAN AND GAY STUDIES READER 381, 385 (Henry Abelove et al. eds., 1993) (explaining American psychiatrists' rejection of Freud's view on homosexuality).

368. See WEST, *supra* note 97, at 97.

369. DUBERMAN, *supra* note 76, at 97 (quoting Charles Socarides' stance on the root of homosexuality).

identity compression, made news headlines,<sup>370</sup> and created an archetypical sexual minority portrayed throughout popular culture.<sup>371</sup> The comments of a policeman involved in quelling the 1969 Stonewall riots provide evidence of the pervasiveness of the mental illness model of homosexuality. The officer who was otherwise unapologetic about using blunt force to subdue protesters refrained from beating gay men and transgender individuals, he explained, because “they’re sick . . . you can’t hit a sick man.”<sup>372</sup>

The mental illness model readily adopted in the United States was repeatedly challenged on at least three grounds. First, the “scientific” conclusions were not based on comprehensive studies of gay men and lesbians, but rather on psychologists’ clinical observations of homosexuals who sought (or were involuntarily subjected to) mental health care.<sup>373</sup> As one psychotherapist explained almost forty years ago, “[i]ssues of sickness” seem valid to clinicians because “they consistently see a sample of the population for whom homosexual tendencies are associated with severe guilt, conflict, or other neurotic

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370. See, e.g., Howard Kurtz, *A Straight and Narrow Path: It Wasn’t Long Ago that the Media Portrayed Gays as ‘Sick,’* WASH. POST, June 3, 1996, at B1 (concluding from extensive media analysis that a “sense of shame—that being gay was a stigma and a sickness—was relentlessly communicated in the ‘50s and ‘60s through the nation’s newspapers, networks and newsmagazines”); see also Irving Bieber, *Speaking Frankly on a Once Taboo Subject*, N.Y. TIMES, Aug. 23, 1964, at SM75 (explaining that parental influence during childhood has a direct influence on whether a child will exhibit homosexual tendencies); Robert C. Doty, *Growth of Overt Homosexuality In City Provokes Wide Concern: Key to Problem Called Medical*, N.Y. TIMES, Dec 17, 1963, at 1 (observing that the openness of homosexuals in Manhattan “has become the subject of growing concern of psychiatrists, religious leaders and the police,” and reporting that psychiatrists have “overwhelming evidence that homosexuals are created—generally by ill-adjusted parents—not born” and thus “homosexuality can be cured”); Morton Friedman, *The Homosexual’s ‘Value System,’* N.Y. TIMES, Jan. 28, 1968, at SM15 (setting forth comments of a medical doctor about alleged depravity of homosexuals); Emma Harrison, *Women Deviates Held Increasing: Problem of Homosexuality Found Largely Ignored*, N.Y. TIMES, Dec 11, 1961, at 24 (reporting on a talk by Dr. Charles Socarides in which he claimed that an increase in female homosexuality was the result of a “disordered and confused society”); *Therapy is Found Curing Deviates*, N.Y. TIMES, Jan. 31, 1965, at 61 (reporting a psychiatrist’s claim “that he ha[d] been successfully treating homosexuality for [ten] years”); Gerald Walker, *The Gay World*, N.Y. TIMES, Mar. 9, 1969, at BR30 (concluding from Martin Hoffman’s *THE GAY WORLD* and Charles W. Socarides’ *THE OVERT HOMOSEXUAL* that “homosexuality is not congenital, but rather an acquired behavioral reaction to some threatening factor in the homosexual’s life” and that “homosexuality is a painful, punishing, decidedly un-‘gay’ way of life”).

371. See, e.g., Donald H.J. Hermann, *Legal Incorporation and Cinematic Reflections of Psychological Conceptions of Homosexuality*, 70 UMKC L. REV. 495, 499-502 (2002) (reporting on the historic absence of sexual minorities and depictions of such groups as depraved throughout popular culture and especially in movies).

372. Leitsch, *supra* note 76, at 15 (quoting an unidentified police officer).

373. See, e.g., McNEILL, *supra* note 266, at 117 (reporting in 1976 that “[o]nly in recent times has any effort been made to study those individuals who live relatively discreet, stable, law-abiding, constructive and socially useful lives as homosexuals”).

disturbances.”<sup>374</sup>

Second, the internal emotional disturbance reported by clinical patients was largely due to external conflicts encountered from living within a culture that rejected them. Thus, “the neurotic traits ascribed to homosexuals are the same for any individual who identifies him- or herself with a persecuted minority.”<sup>375</sup> Third and finally, focus on homosexual desire or behavior inappropriately ignored the larger psychological complexity of the human mind and personality.<sup>376</sup>

Dissent within the American Psychiatric Association (“APA”)<sup>377</sup> and “intense activism by gay and lesbian advocates”<sup>378</sup> brought the scientific shortcomings of the mental illness classification to light. As a result, the APA board of trustees discarded its classification of homosexuality as a mental illness on Dec. 15, 1973.<sup>379</sup> On the same day, the APA adopted a resolution advocating the repeal of laws criminalizing sodomy and encouraging “the enactment of civil rights legislation at the local, state, and federal levels that would offer homosexual citizens the same protections now guaranteed to others on the basis of race, creed, color, etc.”<sup>380</sup>

The APA trustees’ decision was challenged as being inappropriately motivated by external political pressures, but withstood an

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374. C. A. Tripp, *Who is a Homosexual?*, 58 SOCIAL PROGRESS 13, 18 (1967).

375. MCNEILL, *supra* note 266, at 115; see JOHN CAVANAUGH, COUNSELING THE INVERT 37 (1960) (concluding that “[h]omosexuality may be a symptom of a neurosis or psychosis, but in such cases it represents the individual’s reaction to society or society’s reaction to him”).

376. See MCNEILL, *supra* note 266, at 117-19 (discussing psychologist Evelyn Hooker’s conclusions in a 1961 report that she prepared for the New York Council of Churches, *Foundations for Christian Family Policy*, in which Hooker noted the shortcomings of ignoring the larger psychological complexity of the human mind and personality when analyzing homosexual desire).

377. “APA” refers to the American Psychiatric Association. To avoid confusion, the American Psychological Association is not abbreviated in the text of this article.

378. Susan Etta Keller, *Crisis of Authority*, 11 YALE J.L. & FEMINISM 51, 69 (1999). Early lesbian rights activist Del Martin commented at an APA meeting in 1970 that “the psychiatric profession has replaced the Church and the Law as the most destructive force in the life of the homosexual.” TOBIN & WICKER, *supra* note 76, at 60. Martin further chastised the mental health profession for cloaking its conclusions about sexual minorities in the guise of scientific fact when in truth those conclusions were based on “conjectures and rationalizations” and on “the value judgment that heterosexuality, because it is procreative, is the only acceptable form of sexual behavior or life style.” *Id.*

379. See RUDACILLE, *supra* note 36, at 192-93 (recounting the internal and external political struggles that led the APA to delete its characterization of homosexuality as a pathology in its DSM); see also William Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 934-39 (1997) (discussing the APA battle over homosexuality’s classification as a mental illness).

380. *Sick No More*, ADVOCATE, Jan. 16, 1974, in WITNESS TO REVOLUTION, *supra* note 61, at 65-66 (quoting the APA resolution of December 15, 1973).

unprecedented referendum vote by APA members.<sup>381</sup> The APA's reversal on homosexuality made headlines<sup>382</sup> and constituted a huge step toward transformative understanding of sexual minorities by the courts and society.<sup>383</sup> The APA, however, did not give sexual minorities a completely clean bill of mental health.

In the DSM-III issued in 1980, for example, the APA adopted the diagnosis of "[e]go-dystonic homosexuality"<sup>384</sup> to describe homosexuals who desire to increase their interest in heterosexual conduct because homosexuality constituted an "unwanted and a persistent source of distress."<sup>385</sup> This category implicitly classified sexual orientation as a choice, lending legitimacy to conversion therapy<sup>386</sup> even while it recognized that the success of such therapy remained in dispute.<sup>387</sup> The category of ego-dystonic homosexuality also reinforced psychology's tendency to fault homosexuals for lacking sufficient coping skills, rather than blame society for prejudicial treatment.

When the APA dropped the ego-dystonic category in its 1987 revisions to DSM-III,<sup>388</sup> it added the diagnosis of "gender identity disorder" ("G.I.D."). Both the 1994 edition (the DSM-IV) and most recent edition (the DSM-TR) issued in 2000 authorize a diagnosis of G.I.D. for adults "preoccupied with their wish to live as a member of the other sex," possibly accompanied by "an intense desire to adopt

381. Fifty-eight percent of the ten-thousand psychiatrists who replied to the referendum affirmed the board's decision. See RUDACILLE, *supra* note 36, at 193; see also MINTON, *supra* note 345, at 219; BAYER, *supra*, note 362.

382. See, e.g., Richard D. Lyons, *Psychiatrists, in a Shift, Declare Homosexuality No Mental Illness*, N.Y. TIMES, Dec. 16, 1973, at 1 (reporting on the APA trustees' original decision); Harold M. Schmeck, Jr., *Psychiatrists Approve Change on Homosexuals*, N.Y. TIMES, Apr. 9, 1974, at 12 (reporting on referendum vote).

383. A small percentage of mental health professionals continue to advocate for the disease model of homosexuality. See David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1311-33 (1999) (presenting and critiquing numerous analyses of the disease model).

384. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III) 281 (3d ed., 1980) [hereinafter DSM-III].

385. *Id.*; see RUDACILLE, *supra* note 36, at 193.

386. The goal of conversion therapy is to change homosexuals into heterosexuals. See Yeoman, *supra* note 109, at 28 (explaining conversion therapy and the controversy surrounding it). "The vast majority of mental-health professionals . . . view reorientation programs with skepticism and alarm." *Id.* at 29; see also WEST, *supra* note 97, at 108 (reporting that "according to well accepted opinion" in 1955, "the psychiatrist should concentrate on making the patient a better adjusted homosexual and not aspire to convert him to heterosexuality").

387. See DSM-III, *supra* note 384, at 282.

388. See generally AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, REVISED (DSM-III-R) (1987) (reflecting the deletion of the ego-dystonic category in the DSM III-R edition).

the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation.”<sup>389</sup>

The G.I.D. label is now “the diagnosis most frequently assigned to children and adults who fail to conform to socially accepted norms of male and female identity and behavior.”<sup>390</sup> On a positive note, this diagnostic category provides a medical classification for transgender persons, opening the door to potential (though rarely available) insurance coverage for treatment including sexual reassignment surgery.<sup>391</sup> The medical legitimacy of gender variation is also arguably advanced through the G.I.D. classification, elevating its status to “something more than the perverse lifestyle choice that fundamentalist Christian and other critics believe it to be.”<sup>392</sup>

Less positively, G.I.D. suggests a medically recognized deficiency in transgender and other individuals for failing to conform to gender stereotypes and/or being unable to cope with the stigma of being nonconformist. As one commentator concludes, “[i]t is disingenuous to pretend . . . that the continued inclusion of gender-variant people in the DSM has not retarded their efforts to be recognized as healthy, functional members of society.”<sup>393</sup> While still not ideal, the assignment of blame implicit in G.I.D. carries fewer negative ramifications for sexual minorities than previous DSM diagnostic categories,<sup>394</sup> especially in light of the general de-stigmatization of mental illness in this country in recent decades.<sup>395</sup>

In the continuing process of de-pathologizing sexual minorities, social scientists have generated impressive evidence demonstrating

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389. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV) 532-533 (4th ed. 1994); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-TR) 576-577 (5th ed. 2000).

390. RUDACILLE, *supra* note 36, at 193.

391. Some have labeled the potential insurance benefits stemming from G.I.D. as a “red herring,” arguing that insurance coverage is virtually non-existent for treatments most often sought by transgender patients and contending that gender variant conditions should be considered a medical diagnosis rather than a psychological one to remove the stigma. See RUDACILLE, *supra* note 36, at 212 (quoting Dr. Dana Beyer, “a retired surgeon who underwent sex-reassignment surgery in 2003”); see also *id.* at 215 (citing other experts who urge the medical community to adopt a medical rather than psychological diagnosis for G.I.D., with the reclassification possibly being published in a prestigious medical reference book such as the World Health Organization’s INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES).

392. *Id.* at 216.

393. *Id.* at 211.

394. See *id.* (indicating that DSM-V will be published in 2010, but that it is unclear whether it will retain the G.I.D. diagnosis).

395. See Benedict Carey, *Ideas & Trends; Who’s Mentally Ill? Deciding is Often All in the Mind*, N.Y. TIMES, June 12, 2005, §4, at 16 (reporting on a lengthy government study concluding that, based on current diagnostic criteria, “more than half of Americans will develop a mental disorder in their lives”).

that variations in sexual identity, physicality and orientation represent diversity among humans that pose no threat to society or civilization.<sup>396</sup> Social scientists have documented, for example, that sexual minorities demonstrate levels of mental health comparable to their heterosexual counterparts,<sup>397</sup> enter lasting and rewarding unions,<sup>398</sup> make excellent parents<sup>399</sup> and form highly functional, productive and happy families.<sup>400</sup> These extensive and consistent empirical data resulted in the endorsement of same-sex marriage by

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396. See Evelyn Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. PROJECTIVE TECH. 18, 29 (1957) (determining, based on three state-of-the-art tests used to evaluate mental health, that gay men show no signs of psychopathology, and asserting that “homosexuals *may* be very ordinary individuals, indistinguishable, except in sexual pattern, from ordinary individuals who are heterosexual”); Evelyn Hooker, *Male Homosexuality in the Rorschach*, 22 J. PROJECTIVE TECH. 33, 53 (1958) (finding that expert analyses of responses to a series of Rorschach tests did not lead to accurate diagnosis of male homosexuality); see also MINTON, *supra* note 345, at 219-35 (explaining the content and impact of Hooker’s work). These and more recent psychological findings are incorporated in several comprehensive studies. See APA, Gay, Lesbian and Bisexual Issues, available at <http://healthyminds.org/glbissues.cfm> [hereinafter APA Gay, Lesbian and Bisexual Issues]; see also Policy Statement of R.U. Paige, Am. Psychol. Ass’n, Resolution on Sexual Orientation and Marriage (July 30, 2004), <http://www.apa.org/pi/lgbc/policy/marriage.pdf> (last visited Nov. 21, 2005) [hereinafter Policy Statement, Paige—Marriage].

397. See Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 685-692 (2003) (concluding that social disenfranchisement influences mental health); see also Tori DeAngelis, *New Data on Lesbian, Gay and Bisexual Mental Health: New Findings Overturn Previous Beliefs*, 33 MONITOR ON PSYCHOL. (2002), available at <http://www.apa.org/monitor/feb02/newdata.html> (summarizing recent studies documenting strong levels of mental health among sexual minority adults and youth, but also suggesting that continued discrimination leads to depression and stress).

398. See Policy Statement, Paige—Marriage, *supra* note 396 (containing extensive data on same-sex couples); see also Friedman & Downey, *supra* note 101, at 927 (noting that “durable, loving sexual partnerships are common among lesbians and gay men”).

399. See CHARLOTTE J. PATTERSON, AM. PSYCHOL. ASS’N, LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS 8 (1995), available at <http://www.apa.org/pi/parent.html> (summarizing extensive empirical literature and concluding that “[n]ot a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents”); Policy Statement of R.U. Paige, Am. Psychol. Ass’n, Resolution on Sexual Orientation, Parents and Children (July 30, 2004), <http://www.apa.org/pi/lgbc/policy/parentschildren.pdf> (last visited Nov., 20, 2005) [hereinafter Policy Statement, Paige—Children]; see also Charlotte J. Patterson et al., *Children of Lesbian and Gay Parents: Research, Law, and Policy*, in CHILDREN, SOCIAL SCIENCE AND, THE LAW 176, 192 (Bette L. Bottoms et al. eds., 2002); Jennifer L. Wainwright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886, 1895 (2004) (concluding from the first national study “that on nearly all of a large array of variables related to school and personal adjustment, adolescents with same-sex parents did not differ significantly from a matched group of adolescents living with opposite-sex parents”).

400. See, e.g., Policy Statement, Paige—Marriage, *supra* note 396 (containing extensive data on same-sex couples); Policy Statement, Paige—Children, *supra* note 399 (noting that “[r]esults of social science research have failed to confirm any . . . concerns about children of lesbian and gay parents”).



the American Psychological Association and the APA as a way to support sexual minorities' mental health and benefit society.<sup>401</sup> In sum, mental health professionals' original condemnation of homosexuality has given way to the position that "homosexuality... implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."<sup>402</sup> These scientific findings have inspired transformative learning in judges and legislators, resulting in less discriminatory legal treatment of sexual minorities.<sup>403</sup>

Contemporary mental health experts have also soundly rejected efforts to "convert" sexual minorities to heterosexuality.<sup>404</sup> Contrary to the position advocated by conservative Christians and a handful of mental health practitioners,<sup>405</sup> the APA has found "no published scientific evidence supporting the efficacy of 'reparative therapy' as a treatment to change one's sexual orientation."<sup>406</sup> Mental health professionals also recognize that conversion therapy significantly harms sexual minorities by increasing the isolation, anxiety and depression accompanying social disapproval.<sup>407</sup> The belief that

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401. See Policy Statement, Paige—Marriage, *supra* note 396. The American Psychiatric Association followed suit in July 2005. See The American Psychiatric Association, Support of Legal Recognition of Same-Sex Civil Marriage: Position Statement (July 2005), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200502.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200502.pdf).

402. See Position Statement of the American Psychiatric Association on Homosexuality and Civil Rights (Dec. 1973), <http://www.psych.org/edu/otherres/libarchives/archives/197310.pdf> (last visited Nov. 21, 2005).

403. See Falk, *supra* note 352, at 37 (noting that courts are using social science studies in their opinions to "debunk common and pervasive myths about homosexuality"). Social science data that positively portrays sexual minority parents has few, but very vocal, critics. See, e.g., Judith Stacey & Timothy J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 160 (2001) (disagreeing with social science criticism that claims the existence of an "ideological bias favoring gay rights that has compromised most research in this field"); see also *supra* Part II.A.2.

404. See Yeoman, *supra* note 109, at 29 (noting that the APA "voted unanimously to oppose conversion therapy").

405. See Knauer, *supra* note 106, at 458-63 (describing the nationwide campaign by religious groups to publicize the "ex-gay movement"). Not all voices within Christianity have accepted conversion theory. See, e.g., Archbishop Rembert Weakland, *Who is our Neighbor?*, CATHOLIC HERALD, July 19, 1980, reprinted in VOICES OF HOPE, *supra* note 124, at 21 (offering the opinion of a Catholic theologian that "[e]xperience shows that very few, even with the best therapists, are capable of changing their sexual orientation.").

406. APA Gay, Lesbian and Bisexual Issues, *supra* note 396; see also Yeoman, *supra* note 109, at 70 (noting that "[t]wo of the founders of [the "ex-gay" Christian organization] Exodus International left the organization after falling in love" with one another); see also Evangelical Press & Jody Veenker, *Ex-Gay Leader Disciplined for Gay Bar Visit*, CHRISTIANITY TODAY, Oct. 6, 2000, available at <http://www.christianitytoday.com/ct/2000/140/53.0.html> (reporting on Exodus North America board chairman John Paulk, described as "the ex-gay movement's most visible leader," who exercised a "serious lapse in judgment" by visiting a gay bar and then lying about it).

407. See Yeoman, *supra* note 109, at 29 (stating psychologists' belief that "trying to

sexual minorities should be “cured” because they threaten society’s well-being has similarly been rejected by most mental health theorists and practitioners. As one therapist explained:

[I]t is highly questionable whether any sexual behavior exercised between consenting adults is of any real social importance. From a psychiatric point of view, the thing that counts seems to be the efficiency with which an individual functions in life—his usefulness, his enjoyment, and the success of his human interactions. If society has an interest here, it is certainly in the maintenance of high personal efficiency and low neurotic effects. In terms of this ideal, the particular sexual responses of an individual hardly seem to be of any major concern.<sup>408</sup>

Contemporary mental health perspectives on sexual minorities have been widely covered by the media.<sup>409</sup> This stream of factually based information provides numerous triggering events that prompt individuals and institutions to initiate CSRA about sexual minorities. Informed through accurate discourse that includes the scientific data previously discussed, those who engage in CSRA will reject stereotypes falsely linking sexual minorities with mental illness, child molestation and deviance that harms society. Ultimately, people and institutions will experience positive transformation in their meaning schemes and meaning perspectives regarding sexual minorities. In short, the many false assumptions underlying behavior-identity compression will be unraveled and rejected.

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force lesbians and gay men into a mold that doesn’t really fit . . . could lead to depression, addiction, even suicide”); see also Tripp, *supra* note 374, at 18-19 (offering the same opinion almost forty years ago).

408. Tripp, *supra* note 374, at 21.

409. See, e.g., Jane E. Brody, *Study Finds Some Homosexuals are Happier than Heterosexuals*, N.Y. TIMES, Jul. 9, 1978, at 22 (reporting that “many homosexual men and women lead stable lives without frenetic sexual activity and that some are considerably happier and better adjusted than heterosexuals as a whole”); Marilyn Elias, *Psychologists to Endorse Gay Marriage*, USA TODAY, July 28, 2004, available at [http://www.usatoday.com/news/nation/2004-07-28-apa-gay-marriage\\_x.htm](http://www.usatoday.com/news/nation/2004-07-28-apa-gay-marriage_x.htm) (reporting on American Psychological Association’s resolution approving same-sex marriage); Daniel Goleman, *Studies Find No Disadvantage in Growing Up in a Gay Home*, N.Y. TIMES, Dec. 2, 1992, at C14; Peter Kihss, *A New Study Urges Homosexuals to Speak Out*, N.Y. TIMES, May 19, 1974, at 49 (reporting that “[a] new study of homosexual men in the United States, the Netherlands and Denmark has found their ‘psychological well being’ as good as other men’s and urges that homosexuals ‘end their tradition of silence’ to fight discrimination”); Michael Kranish, *Beliefs Drive Research of New Think Tanks: Study on Gay Adoption Disputed by Specialists*, BOSTON GLOBE, July 31, 2005, at A1 (discussing publication of negative studies on gay parents by conservative think tanks and contradictory scientific data from mainline scientific organizations including the American Psychological Association, American Sociological Association, and the American Academy of Pediatrics); Charles Yoo, *Same-Sex Marriage Gets Boost; Psychiatrists’ Proclamation is First for a Medical Association*, THE ATLANTA JOURNAL-CONSTITUTION, MAY 23, 2005, at 1-A (reporting on American Psychiatric Association’s endorsement of same sex marriage).

### 3. *Physiological Evidence and the Nature/Nurture Debate*

We have no doubt that properly coordinated research into the etiology of homosexuality would have profitable results.<sup>410</sup>

Many early sexologists posited that sexual orientation—or inversion, as it was commonly known then—was biologically determined, that it constituted “a natural, if not normal, biological variation,”<sup>411</sup> and that sexual minorities “should be accorded equal social and legal treatment.”<sup>412</sup> In his pioneering 1886 work on sexuality titled *Psychopathia Sexualis*,<sup>413</sup> for example, physician and psychiatry professor Richard von Krafft-Ebing concurred with Magnus Hirschfeld, Havelock Ellis and others who believed that homosexuality was biologically based.<sup>414</sup>

Although *Psychopathia Sexualis* “became a classic known far beyond professional circles” immediately after publication,<sup>415</sup> its biologic theory of sexual minority status was not widely accepted. Rather, as previously discussed, scientists gravitated toward a psychosocial explanation for deviations from heteronormativity.<sup>416</sup> In addition, scientists’ historic condemnation of sexual minorities was grounded in the belief “that heterosexuality is the *biologic* norm and

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410. WOLFENDON, *supra* note 121, at 126 (studying law and homosexuality and leading to the decriminalization of private consensual adult sexual acts in Great Britain).

411. Knauer, *supra* note 106, at 410 (discussing, among others, the work of German physician Karl Westphal who used the term “contrary sexual feeling” in an 1870 article credited with being the first medical piece on homosexuality); *see also* Symonds, *supra* note 94, at 15-60 (discussing medical literature on homosexuality at end of the 1800s).

412. MINTON, *supra* note 345, at 11 (discussing the work of Karl Heinrich Ulrichs and Karl Maria Kertbeny in the mid-1800s).

413. RICHARD VON KRAFFT-EBING, *PSYCHOPATHIA SEXUALIS: A MEDICO-FORENSIC STUDY* 285-97 (Harry E. Wedeck trans., 1965).

414. *See* MINTON, *supra* note 345, at 12; *see also* MAGNUS HIRSCHFELD, *THE HOMOSEXUALITY OF MEN AND WOMEN* (Michael A. Lombardi-Nash trans., 2000) (1920) (presenting homosexuality from both “biological occurrence” and “sociological occurrence” perspectives and advocating for the end of victimization, persecution, and prosecution of homosexual men and women); Von Krafft-Ebing, *supra* note 413, at 285-97 (reviewing psychological and physiological theories for origin of homosexuality). VON KRAFFT-EBING also opined “the various grades of congenital sexual inversion represent various grades of sexual anomaly inherited by birth,” greatly influenced by “the law of progressive heredity.” *Id.* at 291; Knauer, *supra* note 106, at 413-18 (discussing work of early sexologists). *See generally* SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE (Lucy Bland & Laura Doan eds., 1998) (providing key excerpts from the writings of Ellis, Hirschfeld, Krafft-Ebing and others on homosexuality, bisexuality, transsexuality and related topics).

415. Ernest van den Hagg, *Introduction* to *PSYCHOPATHIA SEXUALIS*, *supra* note 413, at 8.

416. *See* MINTON, *supra* note 345, at 12.

that unless interfered with all individuals are heterosexuals.”<sup>417</sup>

Today, more than one-hundred and twenty years after von Krafft-Ebing espoused the theory that biology and homosexuality are inextricably connected, scientists continue to wrestle with this question: are variations in sexual orientation and identity caused by a contributing or determinative biologic component (the “nature” argument), environmental factors (the “nurture” argument), or a combination of nature and nurture?<sup>418</sup>

This question led early medical sex researchers to distinguish “between the congenital (passive) male homosexual and the acquired (active) male homosexual,”<sup>419</sup> and to argue that biological determinants like a high level of female hormones were present in the former and not in the latter.<sup>420</sup> Scientific discoveries regarding possible physiological mechanisms or components of sexual orientation over the past few decades offer interesting insights on, but no firm resolution of, the nature-versus-nurture debate.<sup>421</sup>

Scientists have explored, for example, the possible relationship between biology and sexual orientation by examining humans’ genetic makeup,<sup>422</sup> brain structure,<sup>423</sup> pre-natal exposure to male

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417. BIEBER, *supra* note 358, at 319. Inter-sexed individuals have similarly suffered from a biological model that demands defining a person as either male or female. See Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices*, 40 HARV. C.R.-C.L. L. REV. 71 (2005); Haas, *supra* note 15; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 292 (1999) (stating that the “inter-sexed” have been historically discriminated against).

418. See, e.g., BIEBER, *supra* note 358, at 18 (reporting that “all psychoanalytic theories assume that adult homosexuality is psychopathologic and assign differing weights to constitutional and experiential determinants”); MINTON, *supra* note 345, at 40-46 (discussing *The Sex Variants Study*, conducted by psychiatrist George W. Henry in 1941, that presented both genetic and environmental theories present in the medical literature).

419. MINTON, *supra* note 345, at 310 n.10.

420. See *id.* (stating that proponents of this theory included physician Clifford A. Wright, who published extensively on the topic in the late 1930s); see also *id.* at 164-69 (noting that opponents of this theory included famed sexologist Dr. Alfred Kinsey).

421. See generally CHANDLER BURR, *A SEPARATE CREATION: THE SEARCH FOR THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (1996).

422. See, e.g., J. Michael Bailey et al., *Heritable Factors Influence Sexual Orientation in Women*, 50 ARCHIVES GEN. PSYCHIATRY 217, 221 (1993) (concluding from a study of twins that “[a]lthough we found evidence that female sexual orientation is at least somewhat heritable, the question of what, precisely, is inherited remains”); Dean H. Hamer et al., *A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation*, 261 SCIENCE 321 (1993) (finding genetic trail for sexual orientation); Stella Hu et al., *Linkage Between Sexual Orientation and Chromosome Xq28 in Males but not in Females*, 11 NATURE GENETICS 248, 248 (1995) (concluding that the Xq28 region likely contains a locus that influences sexual orientation in men); Kenneth S. Kendler et al., *Sexual Orientation in a U.S. National Sample of Twin and Nontwin Sibling Pairs*, 157 AM. J. PSYCHIATRY 1843, 1845 (2000) (reporting “that genetic factors may provide an important influence on sexual

hormones,<sup>424</sup> birth order within a male sibling set,<sup>425</sup> right versus left hand preference,<sup>426</sup> startle responses,<sup>427</sup> finger length,<sup>428</sup> reactions to certain scents<sup>429</sup> and the structure<sup>430</sup> and effectiveness of ears.<sup>431</sup>

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orientation"); Brian S. Mustanski et al., *A Genomewide Scan of Male Sexual Orientation*, 116 HUM. GENETICS, 272, 276-77 (2005) (reporting identification of several genetic regions possibly influencing homosexuality following scan of entire human genetic makeup); see also Ebru Demir & Barry J. Dickson, *fruitless Splicing Specifies Male Courtship Behavior in Drosophila*, 121 CELL 785 (2005) (noting that a gene that affects sexual orientation in male and female fruit flies has also been identified). But see Jennifer Kabbany, *Scientific Studies Fail to Corroborate 'Gay Gene' Theory: Homosexual Activists Split in Issue*, WASH. TIMES, Aug. 1, 2000, at A2 (addressing "the argument that homosexuality is a decision rather than an inherited trait"); George Rice et al., *Male Homosexuality: Absence of Linkage to Microsatellite Markers at Xq28*, 284 SCIENCE 665, 665 (1999) (reporting "results [that] do not support an X-linked gene underlying male homosexuality").

423. See Vittorio Gallo & Phyllis R. Robinson, *Is There a "Homosexual Brain"?*, 7 GAY & LESBIAN REV. 12 (2000) (summarizing existing studies, finding them inconclusive, and suggesting a need for additional studies "based on brain function and physiology" that consider "the complex interactions occurring between the brain and the environment"). See generally SIMON LEVAY, *THE SEXUAL BRAIN* (1993) (placing brain studies in the context of other evidence suggesting biological components of sexual orientation and behavior).

424. See Heino F.L. Meyer-Bahlburg et al., *Prenatal Estrogens and the Development of Homosexual Orientation*, 31 DEV. PSYCH. 12 (1995) (analyzing sexual orientation of women with prenatal exposure to non-steroidal synthetic estrogen and concluding hormones may play a role in development of orientation).

425. See James M. Cantor et al., *How Many Gay Men Owe Their Sexual Orientation to Fraternal Birth Order?*, 31 ARCHIVES OF SEXUAL BEHAV., 63, 67-68 (2002) (finding that boys with 2.5 older brothers are twice as likely to be gay as those with no older brothers, and that a boy with four older brothers is three times more likely to be gay); Alison Motluk, *The Big Brother Effect*, NEW SCIENTIST, March 29, 2003, at 44, (summarizing several studies that examine the role of older brothers in determining the sexual orientation of their younger siblings).

426. See Martin L. Lalumiere et al., *Sexual Orientation and Handedness in Men and Women: A Meta-Analysis*, 126 PSYCH. BULL. 575 (2000) (analyzing twenty previous studies showing that a high percentage of homosexual men and women are left handed, and concluding that neurodevelopmental mechanisms underlie sexual orientation).

427. See Qazi Rahman et al., *Sexual Orientation-Related Differences in Prepulse Inhibition of the Human Startle Response*, 117 BEHAV. NEUROSCIENCE 1096 (2003) (finding that lesbian women show significantly masculinized patterns of hardwired startle reactions compared to heterosexual women).

428. See Terrance J. Williams et al., *Finger-Length Ratios and Sexual Orientation*, 404 NATURE 455, 455 (2000) (finding a correlation between prenatal exposure to androgens, finger length and sexual orientation).

429. See Ivanka Savic et al., *Brain Response to Putative Pheromones in Homosexual Men*, 102 PROC. NAT'L ACAD. SCI. U.S. 7356, 7360 (2005) (finding that the reaction of male brains to the odor of testosterone compared to estrogen-based compounds was determined by sexual orientation rather than biologic sex); see also Nicholas Wade, *For Gay Men, Different Scent of Attraction*, N.Y. TIMES, May 10, 2005, at A1 (explaining that an individual's brain reacted differently to the a given scent based upon their sexual orientation).

430. See Dennis McFadden & Edward G. Pasanen, *Spontaneous Otoacoustic Emissions in Heterosexuals, Homosexuals, and Bisexuals*, 105 J. ACOUSTICAL SOC'Y AM. 2403, 2412 (1999) (finding cochleas of homosexual and bisexual females partially masculinized).

431. See Dennis McFadden and Craig A. Champlin, *Comparison of Auditory*

Scientific studies have also suggested a biological component for transsexualism.<sup>432</sup> The nature argument has been further bolstered by the same-sex partnering of humans across time and cultures<sup>433</sup> and “ubiquitous” same-sex behaviors among non-human animals.<sup>434</sup> In some quarters, scientific dialogue has moved past the issue of whether the so-called “gay gene” (or biological basis) exists to theorizing on how such a gene survived among a population that did not generally procreate.<sup>435</sup>

Many of these studies suggest that biology plays a role, and perhaps an important one, in sexual orientation and identity. Nonetheless, scientists generating this empirical data caution that “strictly biological, genetic, social or familial explanations rarely explain how each of us develops a particular sexual orientation.”<sup>436</sup> Scientists readily admit that significant additional study is needed before the “nature” component of sexual orientation is fully understood.<sup>437</sup>

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*Evoked Potentials in Heterosexual, Homosexual, and Bisexual Males and Females*, 1 J. ASS’N RES. OTOLARYNGOLOGY 89, 95 (2000) (finding significant differences in hearing responses based on sexual orientation and positing that homosexuals’ prenatal exposure to higher level of androgens may account for the differences).

432. See BPNA Abstracts: Proceedings of the Head Injury Conference and Annual Meeting of the British Neuropsychiatry Association, The Institute of Child Health, Central London, 12-14 February 2003, 74 J. NEUROLOGY & PSYCHIATRY 830, 836 (2003) (discussing common patterns in transsexuals’ hand use preference, fingerprint pattern, family tree patterns and sibling order).

433. See THE MANY FACES OF HOMOSEXUALITY: ANTHROPOLOGICAL APPROACHES TO HOMOSEXUAL BEHAVIOR (Evelyn Blackwood ed., 1986); see also Edward Westermarck, *Homosexual Love*, in HOMOSEXUALITY: A CROSS-CULTURAL APPROACH, *supra* note 83, at 106 (reviewing anthropological research from the beginning of the twentieth century and concluding that “[n]o country and no class of society is free from” homosexuality).

434. See Sandi Doughton, *Animals Exhibit “Gay” Behavior*, SEATTLE TIMES, June 19, 2005, at A18, available at <http://seattletimes.nwsource.com/html/nationworld/2002340835gaycritter19m.html> (discussing the frequency of bisexuality in the animal kingdom). See generally BRUCE BAGEMIHLE, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY (1999) (reviewing scientific papers on more than 450 species throughout the animal kingdom and concluding that homosexuality is ubiquitous); Charles E. Roselli et al., *Sexual Partner Preference, Hypothalamic Morphology and Aromatase in Rams*, 83 PHYSIOLOGY AND BEHAV. 233 (2004) (finding that as many as ten percent of male rams exhibit preference for male sexual partners and concluding that brain structure of male-oriented rams are not completely masculinized, possibly due to prenatal hormonal exposure); Paul V. Vasey, *Same-Sex Sexual Partner Preference in Hormonally and Neurologically Unmanipulated Animals*, 13 ANN. REV. OF SEX RES. 141 (2002) (reviewing research to date and concluding that not all homosexual behavior in animals can be explained by social conventions such as dominance or submissiveness).

435. See Andrea Camperio-Ciani et al., *Evidence for Maternally Inherited Factors Favouring Male Homosexuality and Promoting Female Fecundity*, 271 PROC. ROYAL SOC. LOND. B. 2217, 2218-19 (2004) (finding that women tend to have more children when they inherit the yet unspecified genetic factor linked to homosexuality and thus compensate the gene pool for the lack of offspring fathered by gay men).

436. DeAngelis, *supra* note 101, at 35.

437. See Brian S. Mustanski et al., *A Critical Review of Recent Biological Research on Human Sexual Orientation*, 13 ANN. REV. SEX RES. 89, 110-11 (2002) (suggesting

Christian and political conservatives have been highly critical of studies supporting the nature theory.<sup>438</sup> This criticism comes as no surprise, as the nature theory undermines the volitional element of behavior-identity compression and elevates sexual diversity from a contemptible vice to a naturally occurring (i.e., God given) aspect of human nature.

Studies focusing on a possible biological component for sexual orientation are widely publicized.<sup>439</sup> Regardless of science's eventual conclusion (if any) on the nature-nurture debate, public assimilation of this scientific information may trigger CRSa leading to positive transformative learning about sexual orientation, especially relating to the choice aspect of behavior-identity compression.<sup>440</sup> A comparison

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that there may be many uncharted genetic influences on sexual orientation).

438. See, e.g., Stanton L. Jones & Mark A. Yarhouse, *The Incredibly Shrinking Gay Gene*, CHRISTIANITY TODAY, Oct. 4, 1999, at 53 (denouncing efforts to link sexual orientation and genetic predisposition).

439. See, e.g., Sandi Doughton, *Born Gay? How Biology May Drive Orientation*, SEATTLE TIMES, June 19, 2005, available at [http://seattletimes.nwsource.com/html/localnews/2002340883\\_gayscience19m.html](http://seattletimes.nwsource.com/html/localnews/2002340883_gayscience19m.html) (presenting numerous theories on how various genotypic patterns can affect sexual orientation); Elisabeth Rosenthal, *For Fruit Flies, Gene Shift Tilts Sex Orientation*, N.Y. TIMES, June 3, 2005, at A1 (asserting a link between genetic factors and sexual orientation in fruit flies and hypothesizing that such a link is likely to exist in other species as well); Wade, *supra* note 429 (providing analysis of the scent research that has been conducted to determine whether olfactory response can be linked to sexual orientation); Jennifer Warner, *Genes Linked with Male Sexual Orientation Found*, <http://www.foxnews.com/story/0,2933,145754,00.html> (last visited Nov. 21, 2005) (asserting that there are several different genetic markers that could indicate a predisposition towards homosexuality); Eric Vilain, *Gender Blender: Intersexual? Transsexual? Male, Female Aren't So Easy to Define*, L.A. TIMES, Apr. 19, 2004, at B11 (presenting commentary by the Chief of Medical Genetics at UCLA medical school about the difficulty in determining the appropriate sex for inter-sexed babies, and arguing that sex and sexual orientation pose complicated genetic questions); see also Natalie Angier, *Researchers Find a Second Anatomical Idiosyncrasy in Brains of Homosexual Men*, N.Y. TIMES, Aug. 1, 1992, at 7 (presenting additional evidence that homosexual men are biologically distinct from their heterosexual counterparts); Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec 17, 1991, at A21 (providing further analysis on the debate over whether sexuality may be considered a biological trait or a social decision); Chandler Burr, *Homosexuality and Biology*, ATL. MONTHLY, Mar. 1993, at 47 (summarizing recent scientific research on the biological basis of homosexuality); Mary Challenger, *Why Do We Feel Male or Female? Sexual Identity Rooted in Biology*, DES MOINES REG., Nov. 17, 2003, at 1E (reporting on a scientific study showing that "[s]exual identity is rooted in every person's biology before birth and springs from a variation in our individual genome"); Judy Foreman, *The Biological Basis of Homosexuality*, B. GLOBE, Dec. 2, 2003, at C3 (providing analysis of the debate over the biological basis of sexuality); Mark Schoofs, *Gene Ocide: Can Scientists "Cure" Homosexuality by Altering DNA?*, VILLAGE VOICE, July 1, 1997, at 40 (noting that many view homosexuality as a disease).

440. Medical discoveries related to inter-sexed and transgender persons are also widely publicized. See, e.g., John Cloud, *His Name is Aurora*, TIME, Sept. 25, 2000, at 90 (explaining why parents complied with their six-year old son's request to be treated as a female, the ensuing custody battle with the state, and the positions of medical experts); Mike Lafferty, *Views Change on Deciding Gender: More Choices Await Babies Whose Sex is Unclear at Birth*, COLUMBUS DISPATCH, Feb. 19, 2005, at 03A (discussing the changed medical consensus on immediate surgery for inter-sexed

of public views in Canada, Great Britain and the United States illustrates this point.

In Canada and Great Britain, fifty-four and fifty-five percent of respondents to national surveys, respectively, agreed that homosexuality is “something a person is born with.”<sup>441</sup> In contrast, only thirty-seven percent of U.S. respondents believed that nature is the predominant factor in sexual orientation.<sup>442</sup> The significantly greater legal protections available to sexual minorities in Canada<sup>443</sup> and Great Britain than in the United States,<sup>444</sup> and the public’s more positive attitudes towards gay rights in those countries compared to this country,<sup>445</sup> may be directly linked to the Canadian and English belief that sexual orientation is not a volitional condition, and thus not appropriate justification for discriminatory treatment.

In the United States, scientific confirmation of a biological etiology would also support the argument that sexual orientation is an immutable characteristic, thus entitling sexual minorities to the highest levels of constitutional scrutiny when challenging governmental laws and policies that disenfranchise them.<sup>446</sup> Of

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babies); Mireya Navarro, *When Gender Isn’t a Given*, N.Y. TIMES, Sept. 19, 2004, § 9, at 1 (discussing pressure from parents to immediately assign a sex to inter-sexed babies and the medical profession’s increasing reluctance to do so); Vilain, *supra* note 439.

441. Josephine Mazzuca, *supra* note 267.

442. See *id.*; see also David W. Moore, *Modest Rebound in Public Acceptance of Homosexuals: Public Remains Divided on Cause of Homosexuality*, GALLUP POLL NEWS SERVICE, May 20, 2004, available at <http://poll.gallup.com/content/default.aspx?ci=11755&VERSION=p>.

443. See Miriam Smith, *The Politics of Same-Sex Marriage in Canada and the United States*, PS: POL. SCI. & POL., Apr. 2005, at 225, available at <http://www.apsanet.org/imgtest/PSApr05Smith.pdf> (contrasting the extensive employment protections and family rights available to sexual minorities in Canada compared to the United States); see also The Civil Marriage Act, 2005 S.C., ch. 33, Preamble (effective July 20, 2005) (Can.) (amending the Canadian Constitution to list marriage as a fundamental right and to expressly prohibit denying marriage rights to same-sex couples); The Civil Marriage Act, 2005 S.C., ch. 33, cl. 4 (Can.) (stating that same-sex marriages are not voidable for the reason that both spouses are of the same sex).

444. See Carola Towle, *The Civil Partnership Bill Will Represent a Great Leap Forward Once it Becomes Law*, INDEPENDENT (London), Oct. 28, 2004, at 3 (reporting that effective December 6, 2005, the United Kingdom’s (“UK”) Civil Partnership Act of 2004 provides homosexual couples in England, Wales, Scotland and Northern Ireland with many of the legal protections of heterosexual marriage). In addition, societal transformation and the Employment Equality (Sexual Orientation) Regulations of 2003 have greatly opened up employment opportunities in the UK for sexual minorities. See Cathryn Janes, *Office Hours: Coming Out in Favour: Sexuality Used to Be a Secret in the Workplace, but a New Survey Celebrates the UK’s Most Gay Friendly Firms*, GUARDIAN (London), Jan. 17, 2005, at 4.

445. See Heather Mason Kiefer, *Public Opinion Favors Gay Rights in Britain, Canada: Support for Same-Sex Marriage Stronger in Great Britain and Canada than U.S.*, GALLUP POLL NEWS SERVICE, May 24, 2005, available at <http://poll.gallup.com/content/default.aspx?CI=16456&VERSION=p>.

446. See Symposium, *Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual*



course, even if a direct biological source were discovered, some would find reason to continue to discriminate against sexual minorities. The worst case scenario is that a biological or genetic marker for homosexuality will serve as a socially and medically approved basis for altering or aborting such “defective” fetuses<sup>447</sup> or for implementing social policy based on the “natural distinctions” between sexual minorities and other individuals.<sup>448</sup>

Political pressure on social and medical scientists to avoid research about sexual minorities,<sup>449</sup> significant cuts in public funding for scientific research,<sup>450</sup> and the disregard and misuse of scientific data by the federal government<sup>451</sup> also pose serious obstacles to the

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and Transgendered Law, 27 FORDHAM URB. L.J. 279, 348 (1999) (providing a discussion on the arguments that homosexuality is not behavioral, but instead is an immutable characteristic); see also Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 517 (1994) (discussing the pro-gay arguments from immutability).

447. See Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537, 542-43 (2004) (noting that previous efforts to “improve” the U.S. gene pool resulted in the involuntary sterilization of mentally impaired persons); see also Donald L. Gabard, *Homosexuality and the Human Genome Project: Private and Public Choices*, 37 J. HOMOSEXUALITY 25, 34 (1999) (discussing the screening of fetuses for serious genetic diseases); Schoofs, *supra* note 439; Timothy F. Murphy, *Abortion and the Ethics of Genetic Sexual Orientation Research*, 4 CAMBRIDGE Q. HEALTHCARE ETHICS 340, 343 (1995) (reporting that a genetic test to determine sexual orientation in fetuses may actually allow for gay and lesbian couples to select homosexual children while aborting others); Ted Peters, *On the Gay Gene: Back to Original Sin Again?*, 33 DIALOG 30, 33 (1994) (observing that “[c]onversely and ironically, those who would like to cure society of homosexual disruption may find that the therapeutic method—namely, abortion—is just as morally repugnant as the disease”). Further irony is found in the possibility that religiosity may be of genetic origin. See generally DEAN HAMER, *THE GOD GENE: HOW FAITH IS HARD WIRED INTO OUR GENES* (2004).

448. See Dorothy Nelkin, *A Brief History of the Political Work of Genetics*, 42 JURIMETRICS 121, 123-24 (2002) (advising that scientifically identified “natural distinctions” were previously used to support reproductive control, limit immigration, and perpetuate racial stereotypes). Based on this history, Nelkin cautions against use of “stereotypes and biases [to] frame the interpretation, use and management of genetic information.” *Id.* at 130.

449. See, e.g., Benedict Carey, *Long After Kinsey, Only the Brave Study Sex*, N.Y. TIMES, Nov. 9, 2004, at F1 (stating that “Americans ambivalence about the scientific study of sexuality” has remained constant since Kinsey’s work in the 1940s and that religious conservatives have been especially vocal critics); Erica Goode, *Certain Words Can Trip Up AIDS Grants, Scientists Say*, N.Y. TIMES, Apr. 18, 2003, at A10 (reporting on National Institute of Health’s advice that scientists not use “gay,” “homosexual,” or “transgender” in grant applications to avoid raising conservative Congress members’ ire); Jocelyn Kaiser, *Studies of Gay Men, Prostitutes Come Under Scrutiny*, 300 SCIENCE 403, 403 (2003) (discussing the National Institute of Health’s warning to grant applicants to “cleanse certain terms, such as ‘transgender’” due to the Bush Administration and congressional Republicans’ increased scrutiny of research in such topic areas).

450. See, e.g., Robert Pear, *Congress Trims Money for Science Agency*, N.Y. TIMES, Nov. 30, 2004, at A16 (noting that Congress cut funding for the National Science Foundation two years after promising to double the agency’s budget by the year 2007).

451. See, e.g., Union of Concerned Scientists, *Scientific Integrity*, <http://>

development of scientific data on sexual orientation and sexual identity. The Christian Right's creation and distribution of "scientific" data about homosexuality is similarly troubling.<sup>452</sup>

Despite these hindrances, scientific curiosity about sexuality in general, and about sexual minorities in particular, will continue to generate scientifically sound empirical data in this country and around the world.<sup>453</sup> These scientific studies will increase understanding and likely provide solid evidence for the argument that diversity in human sexual behavior and identity are naturally occurring and harmless—if not beneficial—to society. This type of factual information, generated by credible sources, will trigger transformative learning about sexual minorities within scientific communities, among the general public, within religious denominations and in courts of law. In short, medical science will continue to undermine the utility of behavior-identity compression to rationalize legally sanctioned discrimination against sexual minorities.

#### CONCLUSION: ENLIGHTENMENT REDUX

There are always groups whose interest is furthered by truth, and their representatives have been the pioneers of human thought; there are other groups whose interests are furthered by concealing truth.<sup>454</sup>

Ultimately, hearts and minds open. But it's not pretty and it's not quick.<sup>455</sup>

Enlightenment occurs when people move from an emotional and mystical view of the world to one grounded in demonstrable facts.

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[www.ucsusa.org/scientific\\_integrity](http://www.ucsusa.org/scientific_integrity) (last visited Nov. 20, 2005) (asserting in detailed report that the Bush administration had misrepresented scientific data on numerous issues). More than seven thousand scientists have signed the Union's statement of concern, including many National Medal of Science winners and Nobel Laureates. *Id.*

452. See RIMMERMAN, *supra* note 4, at 134-35 (discussing work of the Family Research Institute, which primarily involves distributing pamphlets that link various social problems to homosexuality).

453. Some scientific studies exploring sexual orientation, gender, and related matters fit under the umbrella of the Human Genome Project. This international research project completed the basic mapping of the more than 20,000 genes in the human body in 2003, and analysis of that data continues. See THE HUMAN GENOME PROGRAM, U.S. DEP'T OF ENERGY OFFICE OF SCIENCE, HUMAN GENOME PROJECT INFORMATION, [http://www.ornl.gov/sci/techresources/Human\\_Genome/home.html](http://www.ornl.gov/sci/techresources/Human_Genome/home.html) (last visited Nov. 21, 2005). The Human Genome Project magnified "the possibilities of tension between religion and science" because "cracking the human genetic code" may ultimately empower humans to "creat[e] human beings in their own image, rather than [in] the image of God." See David Briggs, *Brave New World of Genetic Mapping; In Whose Image?*, PLAIN DEALER, (Cleveland), Aug. 26, 2000, at 1E.

454. Fromm, *supra* note 159, at 249.

455. Swanson, *supra* note 60 (quoting Evan Wolfson).

Transformative learning occurs when people question their long-held assumptions, replace emotionally charged fictions with empirical data, revise their meaning schemes and meaning perspectives and act in accord with those revised views. As science, religion and popular culture inspire transformative learning, sexual minorities will be accorded the rights and privileges routinely accorded their heterosexual counterparts, and Enlightenment redux will occur.

Voices condemning sexual minorities will no doubt remain shrill and constant. But the volume of countervailing, accurate information about sexual minorities being broadcast throughout this country—and indeed around the world—is equally impressive and infinitely more credible. A comparison of my eighteen month journey to produce this article with Professor Rivera's four year struggle to complete her groundbreaking tome in the mid-to-late 1970s<sup>456</sup> dramatically illustrates this point.

Professor Rivera faced huge challenges in her efforts to locate legal and other research materials involving sexual minorities; she also encountered uncooperative if not hostile attitudes from those who possessed such materials.<sup>457</sup> My research efforts readily yielded four file drawers of information covering every aspect of sexual minority's lives. Every organization and individual contacted cooperated fully. These disparate experiences document that sexual minorities, and the legal issues that impact their lives, have moved from the closet to center stage in less than three decades.

It would be foolhardy, of course, to predict that the American public will respond to this deluge of data by immediately demanding an end to legally sanctioned discrimination against sexual minorities. Many obstacles to equality remain, as the prejudice that transformative learning seeks to eradicate has been hammered into the public psyche through decades of behavior-identity compression.<sup>458</sup> Exploitation of behavior-identity compression will continue as long as it fuels the financial and political clout of conservative power brokers.<sup>459</sup> But in a country where presidential

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456. See generally Rivera, *Legal Position*, *supra* note 22.

457. See *id.* at 804-05 (discussing the difficulties in gathering information and decisions on such a controversial subject, including the stigmatization of the researcher); Rivera, *Twenty Years*, *supra* note 47, at 1179-81 (discussing the process of researching and writing her 1979 article).

458. See generally Symposium, *Homophobia in the Halls of Justice: Sexual Orientation Bias and Its Implications Within the Legal System*, 11 AM. U.J. GENDER SOC. POL'Y & L. 13 (2002) (indicating that the prejudice is also entrenched in our legal system).

459. See, e.g., Ralph Blumenthal, *Texas Governor Draws Criticism for a Bill-Signing Event at an Evangelical School*, N.Y. TIMES, June 6, 2005, at A12 (reporting on Republican Rick Perry's signing of a proposed state constitutional amendment

and other important elections are decided by a percentage point or two, one need not convince the entire populace that equality for sexual minorities is appropriate: fifty-one percent will suffice.

Dealing with the emotional and political fallout from the ongoing crusade against sexual minorities proves tiresome for rights advocates. Dedication to task means constantly confronting the same myths and stereotypes used throughout this nation's history to justify repressive and inequitable treatment. The battle is exhausting, yet exhilarating, because the ongoing debates, paired with the news media's apparent fascination with the subject matter, provide unprecedented opportunities to spark transformative learning in individuals, communities and institutions. When one considers the small number of sexual minorities in this country,<sup>460</sup> the visibility of high-profile conservatives who oppose equal rights for sexual minorities must be appreciated for the gift it bestows, to wit, the opportunity for rights advocates to share center stage so that their truths can be spoken, and more importantly, heard. As one observer noted many years ago:

This is a long, a drawn-out, and often a discouraging process, with the difficulties multiplied many times by prejudices and fears, but eventually the masses do catch up to their teachers, and then the lawmakers, politicians, rabble-rousers, begin to reflect this new attitude of the people, no longer finding it profitable to exploit a waning prejudice.<sup>461</sup>

In the end, personal relationships may prove the strongest instigators of positive transformative learning about sexual minorities. A few years ago, I predicted that "the more aware the public becomes about the realities of lives lived by their gay and lesbian neighbors, the more likely the general populace is to perceive this segment of the population not as a threat, but simply as a minor variation of mainstream humanity."<sup>462</sup> I further suggested that "as enlightened familiarity replaces fear born of ignorance, the evolutionary process

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banning same-sex marriage "[o]n a dais before a cheering crowd of close to 1,000 churchgoers and leaders of evangelical ministries" even though Perry's signature was not needed to submit the ballot measure to voters).

460. Measuring sexual minority populations has proven difficult due to inconsistent definitions of sexual minorities and in finding the correct wording of questions to evoke accurate responses. See QUEER SCIENCE, *supra* note 96, at 60-65 (reporting that the ten percent figure originally issued by Kinsey has been widely criticized and that the most studies report an incidence of homosexuality of about one to three percent); see also Milton Diamond, *Homosexuality and Bisexuality in Different Populations*, 22 ARCHIVES OF SEX. BEHAV. 291, 299-302 (analyzing population data from the United States., Asia, the Pacific, Great Britain and Europe regarding heterosexual, homosexual, and bisexual activities).

461. Cory, *supra* note 83, at 436.

462. Becker, *supra* note 47, at 252-53.

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will continue towards a truly tolerant, and thus truly free, society.”<sup>463</sup>

For the reasons articulated in this article, these words still ring true, even in today’s repressive political climate. Despite efforts to suppress it, society’s critical self reflection of assumptions about sexual minorities—and the transformative learning such reflections inspire—will ultimately expose the fabrications used to support behavior-identity compression. This transformation will lead eventually to the demise of legally sanctioned discrimination against sexual minorities in this country, and perhaps the world. This result is inevitable, because while many are chilled, few are frozen.

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463. *Id.* at 253.